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DE
Jure Maritimo
ET
NAVALI:
OR, A
TREATISE
OF
Affairs Maritime,
AND OF
Commerce.

In THREE BOOKS.

The EIGHTH EDITION, with many valuable Additions.

By *CHARLES MOLLOY*, late Barriſter at Law.

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TO THE

READER.

THE Wiſdom of God is highly to be admired, who hath not endowed the other living Creatures with that Sovereign Perfection of *Wiſdom*, but hath ſecured and provided for them by natural Muniments from Aſſault and Peril, and other Neceſſities: But Man he formed naked and frail, becauſe of furniſhing him with Wiſdom, Underſtanding, Memory, and Senſe, to govern his Actions; endowing him with that pious Affection of deſiring Society, whereby one is inclined to defend, love, cheriſh, and afford mutual Aid to each other: Nor hath he in no leſs wonderful manner (infinitely tranſcending all human Wiſdom and Underſtanding) created the material World to be ſubſervient to his Being and Well-being: Yet without human Underſtanding and Reaſon did he not build a Ship, raiſe a Fort, make Bread or Cloth; but theſe came to paſs only by human Arts and Induſtry, in which by the Revolutions of the Celeſtial Bodies, Times and Seaſons, Materials and other Neceſſaries are brought forth, by the Alteration of which Men in their proper Seaſons reap the Fruits of their Labour; ſo that there is no Society, Nation, Country or Kingdom, but ſtands in need of another. Hence it is, that Men knowing each others Neceſſaries, are invited to *Traffick* and *Commerce* in the different Parts and Immenſities of this vaſt World to ſupply each others Neceſſities, and adorn the Conveniencies of human Life.

Lactantius lib. 9.

Seneca 4. *de Beneficiis, cap.* 18.

And

And as God hath ſo ordered this wonderful Dependance of his Creatures on each other, ſo hath he by a Law immutable provided a Rule for Men in all their Actions, obliging each other to the Performance of that which is right, not only to Juſtice, but likewiſe to all other Moral Virtues; the which is no more *but the Dictate of right Reaſon founded in the Soul of Man, ſhewing the Neceſſity to be in ſome Act by its Convenience and Diſconvenience in the rational Nature in Man, and conſequently that it is either forbidden or commanded by the Author of Nature, who is the Eternal Creator of all Things.* And as God hath imprinted this univerſal Law in the Minds of all Men, ſo hath he given Men Power (Society being admitted) to eſtabliſh other Laws, which proceed from the Will, the which is drawn from the Civil Power, that is, from him or them that rule the Commonwealth, or Society of Freemen united for their common Benefit, (which is called the *Laws of Nations*) and which by the Will of all or many Nations, hath received Force to oblige, and is proved by a continued Uſe and Teſtimony of authentick Memorials of learned or ſkilful Men.

Leg. ut vim. D. de juſt. & ur. n. 7, & 8.

Vaſquez 2. Controv. 54.4.

Now by the Laws of Nature every Man is bound to profit another in what he can, nor is the ſame only lawful but commendable; ſo true was that ſaying, *Nothing is more ſerviceable to Man than Man*: But if Man ſhall neglect this immutable Law in the aiding and aſſiſting his Fellow Citizen, and inquire and diſpute why God hath laid this Neceſſity upon him; and when Opportunity gives leave to take the Benefit of Wind or Tide (in order to his furniſhing himſelf or Neighbour with thoſe things that adorn human Life) to diſpute the Cauſes of their Flux and Reflux, and how they vary and change; he not only offends the Laws of Nature, but aſſumes a Power of deſtroying Society, and conſequently becomes (at the leaſt) a wilful Tranſgreſſor of the Laws of Nations.

Florentius 3. part. tit. 22. Sect. 5. Leg. Servius D. de ſerv. export. Cicero Offic. lib. 11. de Panetio.

And

And though the Eternal Power hath ſo eſtabliſhed this Neceſſity in Mankind, that every Man ſhould ſtand in need of another Man, yet ſo great a Providence is over induſtrious Men, that ſcarce any Man not diſabled by Nature or Accident, Sickneſs, Impotency, and the like, but by his Induſtry and Pains may earn more than would ſupply his Neceſſities; and ſo much as any Man gets by being truly induſtrious above what ſupplies his Neceſſities, is ſo much beneficial to himſelf and Family, as alſo an enriching to that Kingdom or State where he reſides: From whence it is, that all Mankind (preſent or to come) are either Traders by themſelves or others; and the Ends deſigned by Trade and Commerce, are Strength, Wealth and Imployment for all ſorts of People, (where the ſame doth moſt flouriſh) the End tending to the Advancement, Opulency and Greatneſs of ſuch a Kingdom or State. *Coke* 2. *Inſt. fol.* 28.

Conſtantinople (the Throne once of Chriſtendom) having been ſacked by *Mahomet* the Second, became a Place of Deſolation as well as Horror, yet he by granting a free Trade and Religion, ſoon after repeopled that great (but unhappy) Spot. Nor did *Silemus* tread amiſs in following the Steps of his victorious Predeceſſor, when having the like Succeſs on *Tauris* and *Grand Cairo*, he tranſlated the *Perſian* and *Egyptian* Artificers and Traders to that repeopled City, following the Example of the *Roman* Virtues. Nor did our victorious Third *Edward* deem it an Act unbeſeeming his great Wiſdom, when he brought in the *Walloons*, whoſe Induſtry ſoon eſtabliſhed the Woollen Manufacture, he vouchſafing to give no leſs a Security for the enjoying their then granted Immunities and Privileges, than his own Royal Perſon. Nor did that politick Princeſs ſhut her Ears from embracing the Offer of thoſe diſtreſſed *Burgundians* (after the Example of her Great and Royal Predeceſſor) who ſought Refuge in her Dominions from the rigid Se- *Anno* 1453. *Vide Knowles* Hiſtory of the Monarchy. *Mirror*, *cap.* 5. *Sect.* 2. 11 *Ed.* 3. *cap.* 3. *Vide Camden's* Q. *Elizabeth*, *An.* 1568. *A. E. Meteran. Hiſtor. Belg. lib.* 3.

verity of the long-bearded *Alva*, who planting them-ſelves by her Appointment at *Norwich*, *Colcheſter*, *Canterbury*, and other Towns, have of thoſe Places (ther only Habitations for Beggars) raiſed them now in Competition with (if not excelling) all, or moſt o the Cities in *England*, for Riches, Plenty, and Trade Nor need we run into the Hiſtory of earlier Times to give an Account of the many Kingdoms and States that have riſen by Induſtry and Commerce; 'tis enough if we caſt our Eyes on our Neighbour the *Hollander*, a Place by relation of *Ortellius*, not much bigger than *Yorkſhire*, and ſuch a Spot, as if God had reſerved it as a Place only to dig Turf out of, for the accommodating thoſe Countries wherein he hoards up the Miſeries of Winter, it affording naturally not any one Commodity of uſe; yet by Commerce and Trade (the Daughters of Induſtry) it is now become the Store-houſe of all thoſe Merchandizes that may be collected from the riſing to the ſetting of the Sun, and gives thoſe People a Name as large and high as the greateſt Monarch this Day on Earth: Nor need we paſs out of Chriſtendom to find Examples of the like, when *Venice*, *Genoua*, *Lubeck*, *Embden*, and the reſt of the *Hanſiatick* Towns, once the Marts of the World, till Sloth, Luxury, and Ambition, got within their Walls, and drove it to Ports of Induſtry, that have ſince kiſſed and embraced it, the which this Iſle, by the Influence of his Royal Majeſty, hath been no ſmall Sharer in.

Hence it is, that Trade and Commerce are now become the only Object and Care of all Princes and Potentates, its Dominion not being acquired by the ruful Face of War, whoſe Footſteps leave behind them the deep Impreſſion of Miſery, Devaſtation and Poverty, they knowing the Return of Commerce is Riches, and Plenty of all things conducing to the Benefit of human Life, and fortifying their Countries with Reputation and Strength.

It

It was Trade that gave occaſion to the bringing of thoſe mighty Fleets to Sea, as if God had left it to them to decide by force, (wherein no Age or Time can witneſs the like) the Empire of the World: Hence it was, (the Advantages being found which ariſe by Commerce) that *Navigation* got its Birth into the World, reducing the ſeveral Nations on the Earth by that means to be even as one common Family; and when in this Iſle we were even in the State of Canibals, it brought in a People that inſtructed us in Arts, Policies and Manners, and taught us Actions no leſs virtuous than thoſe themſelves followed: And altho' long and difficult it was before that mighty People could be brought over to have Thoughts of the Advantages ariſing from *Commerce* and *Navigation* (they only propounding to themſelves Blood, Slaughter, Conqueſt, the Riches and Spoils of Nations;) yet when they entered into the *Carthaginian* War, a Quarrel with a People not worth the Oppoſition of a Tribune (as they thought) finding that neither *Tribune* nor *Conſul*, no nor the Flower of the *Roman* Army was able to withſtand them, or to prevent the Invaſion of their Country, and they in the very Bowels of the ſame, put it to the Queſtion, *Rome* or *Carthage* Miſtreſs of the World; they began to conſider whence and from what Cauſes thoſe unknown *Africans* ſhould withſtand the *Conſcript Fathers* and Power of *Rome*, and ſhould dare to diſpute with thoſe that had led ſo many captivated Kings in Triumph, and brought ſo many haughty Nations to truckle under their victorious Eagles; at laſt they found it was *Commerce* and *Navigation* that gave Power and Force to that mighty People: Then it was that *Rome* began to know *that* Rome *could not be* Rome *without a naval Force*; the which and to redeem their bleeding Honour, they ſoon haſtened and equipt, great as their Competitors; afterwards *Argentum* being won, *Carthage* became no more impregnable; after which with Peace they

Anno 1666. 1672, 1673.

Camden.

Quæſtus omnis indecorus patribus, ſays *Livy, lib* 1. *Dec.* 3.

Though they had 100 Ships, and 75 Gallies under *Cajus Duillus* and his Collegue, as *Polybius* obſerves.

* Now the important City of *Tangier*.

plowed the neighbouring Streights to *Tinges*, * *Gades* and the *Herculean Streights*; nor could any thing be too difficult afterwards, till they arrived on the *Britiſh* Shore, where beholding her ample Bays, Harbours, Rivers, Shores, and Stations, (the Jewels and Ornaments of that Spot, and having made a Conqueſt of the ſame) they ſoon cultivated into our rude Natures the Spirit of *Commerce*, teaching and inſtructing us in thoſe polite Ways that fortify a Kingdom by Naval Force, *as the Standard and undeniable Marks of Empire*, and by aiding and teaching us in the driving on a continued and peaceable Tract of *Commerce*, we have fathomed the unknown Depth of the *Indian* Shores, uniting, as it were, Extremes, made the Poles to kiſs each other, teaching us thereby, that it was not the vaſt Immenſities of Earth that created Empire, but Situation accompanied with *Induſtry*, *Commerce* and *Navigation*, that would enable a People to give Laws to the World: In the Purſuit of whoſe Virtues, this Nation hath not been wanting, and of following their great Directions in the enlarging our Fleet; for they, when they advanced their *Eagles* on the *Britiſh* Shore, found us not then without Ships of Force, time having not been ſo envious to this Iſland, as to eat out thoſe Records wherein mention is made, that the *Britains* accompanied the *Cymbrians* and *Gauls* in their memorable Expedition to *Greece*, long before the Incarnation of the World's Saviour; and it was from that Center that the mighty *Cæſar* firſt drew his Line, and took Thoughts of plowing the Ocean to find out that warlike People to face his victorious Legions; when having landed, and finding a Place adorned by Nature beyond any thing that could be called great, taught us to maintain the Superiority of Dominion, that no neighbouring Nation ſhould frequent our peaceable Shores, and thoſe Merchants that came were aſſigned Places to drive their Commerce and Traffick, jealous that any neighbouring

Strabo, lib. 3.

Rival

Rival ſhould kiſs his beloved *Britannia* but a *Roman*, and for whom he fetched ſo long and tedious a March; thus in our Infancy, teaching us both Defence and Commerce. And when that mighty Empire began to decline, and thoſe remaining *Romans* began to moulter and mix among the Natives, and to become as one People again, then Sloth, Luxury and Idleneſs (the Forerunners of Ruin) invaded our Shores by a fatal Stupidity, which ſuffered our floating Caſtles (Bulwarks of the Kingdom) to rot in their neglected Brine, and our Ports to be ſurveyed by Foreign People; which ſupine Negligence ſoon ſubjected us a Prey to our ambitious Neighbours, who no ſooner finiſhed their Conqueſts, and ſheathed their devouring Swords, but each (as if inſpired by the very Genius of the Place) equip'd out Fleets great as their Competitors, to ſecure what they had ſo dearly won, of whom Story makes mention of the mighty *Arthur*, no leſs famous in his warlike Atchievements, than in leading his Squadrons as far as *Iceland*, bringing thoſe Northern People to pay Obeyſance to his victorious Standard, and acknowledge him as their ſupream Lord, even from the *Britiſh* to the *Ruſſian* Tracts, and by him left to famous *Edgar*, who no ſooner found his undoubted Right, but reſolved to vindicate that Dominion which his Royal Predeceſſor had with ſo much Glory acquired, and with ſo great Care communicated and remitted down to his Succeſſor: With no leſs a Number than four hundred Sail of Ships did that mighty Prince at once cover the neighbouring Ocean, making them the *Portcullis* of this Iſle and the adjacent Seas, by which he vindicated his Dominions on the Waters, and gave Laws in the Chambers of his Empire: Nor did his Succeſſors *Canutus* (whom Record makes mention, that having laid that ancient Tribute, called *Danegeld*, for the guarding of the Seas, and Sovereignty of them, was emblematically expreſſed, ſitting on the

Gauls Towns near *Yarmouth* the Mart for thoſe neighbouring Merchants.

Abrahamus Whelocbus de priſcis Anglorum legibus, written originally by Mr. *Lambard*.

Inſerted in *Leges Edwardi* and afterwards confirmed by the *Norman* Conqueror.

Mr. *Selden's Mare Clauſum, lib.* 2. *cap.* the 10. to the 16.

Shore in his Royal Chair, while the Sea was flowing, ſpeaking, **Tu meæ ditionis es, & terra in qua ſedeo eſt, &c.**) *Egbert*, *Althred*, *Ethelfred*, forget the Aſſertion of their great Predeceſſors Dominion and Sovereignty of the ſame, under no lower a Style, than **Supreme Lords and Governors of the Ocean ſurrounding the Britiſh Shore**, never ſo much as conteſted by any Nation whatſoever, unleſs by thoſe that attempted the Conqueſt of the entire Empire, in which that became ſubject to Fate as well as the other of the Land: Nor did the ſucceeding Princes alſo of the *Norman* Race ſtart or wave that mighty Advantage in their ſucceſſive Claims, and maintaining their Right to the adjacent Sea; as appeared not long after, by that famous Accord, made between *Edward* the Firſt, and the *French* King *Philip the Fair*, calling him to an Account for Piracies committed within the *Britiſh* Seas; the Submiſſion of the *Flemings* in open Parliament in the Second *Edward*'s Reign; and the Honour or *Duty of the Flag*, which the politick King *John* had above four hundred Years ſince challenged by that memorable Ordinance at *Haſting*, there decreed to take place univerſally, not barely as a **Civility**, but as a **Right**, to be paid *cum debita reverentia*, and Perſons refuſing to be aſſaulted and taken as Enemies, the ſame not only to be paid to whole Fleets bearing the Royal Standard, but to thoſe Ships of Privilege that wear the Prince's Enſigns or Colours of Service: Nor was this barely a Decree written, but nobly aſſerted by a *Fleet* of no leſs than 500 Sail in a Voyage Royal of his, wherein he ſailed for *Ireland*, in his way commanding all Veſſels which he met in the eight circumfluent Seas to pay that Duty and Acknowledgment. Nor was the Third *Edward* ſlow in following the Steps of his wiſe Predeceſſors, when he equip'd out a *Fleet* of no leſs than 700 (though on another Occaſion) with 200 of which he vanquiſhed a *Fleet* of twice the Number before *Calais*,

Matth. Weſtm. Anno 1035. *fol.* 409. *Selden's Mare Clauſum, lib.* 2. *cap.* 11.

Coke 4. *Inſt. fol.* 142.

Inter Leges Marinas ſub fine anni Regni Regis Johan. 2.

Calais, to the Loſs of 30,000 *French*. Nor did our victorious Conqueror of the Sepulchre, the Great *Richard*, in his Return from the *Holy Land*, want a Navy Royal to attend him home, by the Force of which he took and deſtroyed near 100 more Ships of the *French*. And look we but into the mighty Actions of the ſucceeding Princes, we ſhall find that all that ever deſigned Empire were zealous in the Encouragement of Navigation, looking on that Axiom as undeniable, *Qui Mare tenet, eum neceſſe eſſe rerum potiri*, and that without which the *Britiſh* Sovereignty is but an empty Title. *Cic. ad Attic. l. 10. Ep. 7.*

Nor ought alone the Praiſes of thoſe great Monarchs, whoſe mighty Care had always been to preſerve the Reputation of their Empire in their Maritime Preparations, to be remembered, but alſo thoſe of our Inhabitants, who always have been as induſtrious to follow the Encouragement of thoſe Princes under whom they flouriſhed, and who with no leſs Glory and timely Application in Traffick, did conſtantly follow the Examples of thoſe of *Genoa*, *Portugal*, *Spaniards*, *Caſtilians*, and *Venetians*, whoſe Fame in Matters of Commerce ought to be enrolled in Letters of Gold, ſince the Ages to come, as well as preſent, having been doubly obliged to their Memory, the third of which making uſe of a diſcontented Native of this Iſle, the famous *Columbus*, who, prompted by that Genius that naturally follows a native wiſe Man, diſcovered a new World, in whoſe Expedition he fathomed unknown Paths, and detected the *Antilles*, *Cuba*, and *Jamaica*, &c. and the *Terra Firma* of the *American* Shore, who taking his Conjectures from the ſpiring of certain Winds from the *Weſtern* Points by ſtrong Impulſe, accompanied with that Philoſophy he attained to, concluded ſome Continent muſt needs be hid in thoſe unknown Parts; his Service being firſt offered to his Prince, and refuſed, he was ſoon after entertained, purely on the

Born in *England*, but Reſident at *Genoa*.

Hen. 7.

Campanel. Hiſt. Hiſpan. Faith of that noble Princeſs *Iſabella* of *Spain*, who for 17,000 Crowns (for which ſhe engaged her *Jewels*) received not long after, as many Tuns of Treaſure, and to her Huſband's own Uſe, in eight or nine Years Time came above fifteen hundred thouſand of Silver, and three hundred and ſixty Tuns of Gold. Thus Ingenuity encouraged, though in one ſingle Perſon, hath occaſioned Wonders, and from a ſmall Kingdom (as *Spain*) it hath ſince raiſed its Head, in a Condition of bringing all thoſe many Kingdoms, and vaſt Immenſities of Earth which they poſſeſs, under their Protection; putting them once on Thoughts of no leſs than an UNIVERSAL MONARCHY. We need only mention *Sebaſtion Chabot*, a Native of *Briſtol*, who diſcovered *Florida*, and the Shores of *Virginia*, dedicated to that Virgin Princeſs *Elizabeth*, *Thorn*, *Elliot*, *Owen*, *Gwyned*, *Hawkins*, *Cavendiſh*, *Furbiſher*, *Davis*, *Stadſon*, *Ralegh*, and the incomparable *Drake*, who was the firſt (agreed univerſally) of any Mortal to whom God vouchſafed the ſtupendous Atchievments of incompaſſing not this New World alone, but New and Old together, twice embraced by that mighty Man, who firſt making up to *Nombre de Dios*, got ſight (with Tears of Joy) of the *Southern* Seas, the which in five Years after he accompliſhed, paſſing through the *Magellan Streights* towards the other *Indies*, and doubling the famous Promontory, he circumnavigated the whole Earth.

Nor ought that truly worthy Captain Sir *John Narborough* be precluded from having Place after the mighty *Drake*, he having not long ſince paſſed and repaſſed the *Magellan Streights*, by which that worthy Perſon hath performed that Atchievement, which was never done by any Mortal before. To reckon up the particular Actions of *John Oxenham* (a Sharer in that mighty Performance of *Drake*) who drawing his Veſſel up to Land, and covering the ſame with Boughs, paſſed the unknown Paths of Land from

Nombre

Nombre de Dios to the *South* Sea, and there building a Pinance, enters the Iſle of *Pearls*, and from the *Spaniards* takes a Treaſure almoſt beyond Credit; of the undefatigable Diligence of *Willoughby*, *Burroughs*, *Chanceler*, *Buffin*, *Furbiſher*, *James Middleton*, *Gilbert Cumberland*, who plowed up the *North-Eaſt* and *North-Weſt Cathaian* and *China* Paſſage; of *Jones* and *Smith*, whoſe Fortune and Courage was great in thoſe Parts; of *Poole*, who found the Whale Fiſhing; of Captain *Bennet*, the firſt Diſcoverer of *Cherry-land*; of *Gillian* and of *Pett*, and *Jackman* that paſſed the *Vaigates*, *Scythian* Ices, and the River of *Ob*, as far as *Nova Zembla*; nor of the famous *Davies* and *Wood*, who had penetrated to 86 Degrees of Latitude, and almoſt ſet their Feet on the *Northern* Pole, and for truly valiant the famous *Monk*, *Blake*, *Lawſon*, *Mines*, *Sandwich*, *Oſſory*, and the never-to-be-forgotten *Spragg*, and living his Royal Highneſs *York*'s victorious Duke, and the brave *Rupert*, Men whoſe Courage and glorious Actions as well in Battles as in the atchieving of Diſcoveries, and pointing out to Places for an immenſe Improvement in Navigation and Commerce, ought to be inrolled in the Temple of Fame as Monuments to ſucceeding Ages, of their mighty and laborious Travails and Induſtry. The Conſideration of all which gives ſome Sparks of Encouragement to the writing the enſuing Tract, eſpecially when reflecting, that among all Nations, there is a Common Law which governs the mighty Thing of Navigation and Commerce; I had ſome Impulſes more than ordinary to induce me to the ſame, eſpecially at a time when Navigation and Commerce were never (from the Erection by Divine Inſtinct of that mighty Prototype, the Ark to this preſent Age) in greater Eſteem than now, and by which we have found vaſt and great Eaſements and Diſcharges from thoſe royal and juſt Rights and Dues which now and of old were juſtly due to thoſe that governed this

Empire;

Empire; therefore ought by all ways and means to be fortified and encouraged, be it by whatſoever Art, Science or Thing that does in the leaſt point out towards the ſame. Nor was it then wanting in Thoughts to promote and incite the Profeſſors of the Law, raiſing and ſtirring up their Genius to the Advancement of the Law in this Point; and though I believe many have wiſhed that ſuch a thing might be, yet none that I can find have ever yet attempted the ſame: Nor is it poſſible, unleſs thoſe things which are by Law *conſtituted and known*, be rightly ſeparated from thoſe that are *natural*; for natural Law is immutably and always the ſame, therefore may eaſily be collected into Art: But things that come from Conſtitution, becauſe they often vary and change, and are divers in divers Places, are put without Art, as other Precepts of Laws poſitive or municipal; hence it was that the Conſtitutions and Laws of *Rhodes*, for their Juſtice and Equity, got footing amongſt the *Romans* as well as amongſt other the bordering People on the *Mediterranean*, *Rhodiorum uſq; rerum memoriam diſciplinæ Navalis & gloria remanſit*; yet when they, as well as the *Romans*, became ſubject to Fate, they then remained only as Examples of Juſtice and Reaſon for others to imitate and follow: An obſequious Adorer of which was the great *Juſtinian*, who cauſed them to be inſerted into the Civil Law; and though they obtained a Place amongſt others of the Ancient *Romans* as well as the Modern, yet have they not all received by Cuſtom ſuch a Force as may make them Laws, but remain only as they have the Authority in Shew of Reaſon, which binds not always alike, but varies according to Circumſtances of Time, Place, State, Age, and what other Conveniences or Inconveniences meet with it; nor have thoſe Laws, inſtituted at *Oleron*, obtained any other or greater Force than thoſe of *Rhodes* or Imperial, conſidered only from the Reaſon the which are not become Laws

Manil. pro Orat. Leg.

And M. Serjeant *Callis* muſt be ſo underſtood of the ancient Civil and Modern *Roman* Law reduced into one, and they are not now two Laws, one Civil, and the other Imperial, but only one, that is, the Imperial. *Vide* his Reading on the Statute of Sewers, *Sect.* 1. *fol.* 31.

Laws by any particular Cuſtom or Conſtitution, but only eſteemed and valued by the Reaſons found in them, and applied to the Caſe emergent.

The Article of Enquiry annexed to them in 12 *Ed.* 3.

'Tis true, that in *Rome* and ſome other Parts of *Italy* and *Germany*, and the Kingdom of *Portugal*, in all thoſe Caſes wherein the municipal Ordinances of thoſe Countries have failed in providing, the Imperial Laws (if the Caſe be ſuch as that it *non Tragua peccado*, or be not ſpiritual) is there made of force; but there is no other Nation, State or Republic can be named, where any Part of the Body of thoſe Imperial Laws hath obtained the juſt Force of a Law, otherwiſe than as Cuſtom hath particularly induced it; and where no ſuch ſettled Cuſtom hath made it a Law, there it hath Force only according to the Strength of Reaſon and Circumſtance joined with it, or as it ſhews the Opinion and Judgment of thoſe that made it, but not at all as if it had any commanding Power of Obedience, that is, *valet pro ratione, non pro inducto jure; pro ratione quantum Reges, Dynaſtæ & Reipublicæ intra poteſtatis ſuæ fines valere patiuntur*: And for *Spain* it is obſerved, *Hiſpani duplex habent Jus, ſolum Canonicum ſcilicet & Regium; Civile enim* (meaning the Imperial Laws) *non habet vim Legis, ſed rationis.* And ſince this Kingdom, as well as moſt others, being free from all Subjection to the Empire, having a conſtituted or known Law of its own, excludes all Imperial Power and Laws, otherwiſe than as Cuſtom hath variouſly made ſome Admiſſion, I applied myſelf to the Collection of ſuch Matters, according to my inconſiderable Judgment, as are either conſtituted by the Supream Authority of the Three Eſtates, or that which hath in ſome meaſure obtained by continued Cuſtom the Force of Law in reference to Matters Maritime, and of Commerce, as well in Caſes publick as private.

The Inquiſition at *Quinſborough*, 49 *E.* 3. *Anno* 1375. Statutes of Enquiry tranſlated by *Roughton*.

Selden's Titles of Honour, *lib. ult. cap. ult.*

By the firſt Part of which I thought it neceſſary, ſince Nature by Traffick hath made us all Kinſmen, to conſider and examine upon what Grounds, and

in

in what manner, *Commerce* was firſt procured and eſtabliſhed, which is by the Laws of Leagues, Embaſſies, and the like, which is a thing fit to be known; ſo likewiſe of what may interrupt the ſame, and likewiſe of thoſe that have any reference to Seafaring Cauſes in Matters Civil.

In the Proſecution of this Work, I have taken care to refer thoſe things, which pertain to the *Laws of Nature*, unto Notions ſo certain, that no Man, without offering of Violence to himſelf, may deny them; and to aſcertain the Truth of ſuch, I have uſed the Teſtimonies of ſuch Authority as in my weak Judgment are of Credit to evince the ſame; and as to that Law, which we call the Law of Will, or Common Conſent, or the Law of Nations, for that which cannot by ſure Conſequence be deduced out of ſure Principles, and yet appears every where obſerved, muſt needs have its Riſe from free Will and Conſent, which is that which is called the *Law of Nations*; both which (as much as poſſible) hath been endeavoured to be kept aſunder where the Matter hath required it. And for the Civil Law, I have aſcertained the ſeveral Authorities which I have made uſe of, that is, of the *Romans*, into three ſorts, the *Pandects*, the *Codes* of *Theodoſius* and *Juſtinian*, the *Novel Conſtitutions*, and theſe moſt excellent *Juriſconſults* that have by their Profoundneſs of Judgment illuſtrated the obſcure Paths of the ſame Law; the third thoſe moſt excellent Perſons who joined Policy to Law, as *Grotius*, *Ralegh*, *Bacon*, *Selden*, and the like. Of other Pieces, that of *Shardius*, intituled, *Leges Navales Rhodiorum*, & *ſelectæ Rhodiorum*, *Petrus Pekius* the *Zealander*, *Locinius*, *Vinius*, that of *Oleron* collected by *Garaſias* alias *Ferrand*, and *Cleriack*.

As to thoſe Matters that have paſſed the Pikes at the *Common Law*, I have as carefully as poſſible referred to their ſeveral Authorities. In the whole Work I have no where medled with the *Admiralty* or its Juriſdiction

riſdiction (unleſs by the by, as incidently falling in with other Matters) knowing well, that it would have been impertinent and ſaucy in me to enter into the Debate of *Imperium merum*, *Imperium mixtum*, *Juriſdictio ſimplex*, and the like, and of the bounding out of Juriſdictions, which in effect tends to queſtion the Government, and trip up the Power that gives Laws and Protection to us; ſince all that can be ſaid, as well on the one ſide as the other, hath been ſo fully and learnedly handled and treated of by ſeveral worthy Perſons (that have indeed ſaid all that can be ſaid) but more eſpecially in that famous Diſpute not long ſince before His Sacred Majeſty in Council, where all the moſt elaborate and ingenious Reaſons that could be drawn by the Skill of a learned Civilian, were there aſſerted in vindicating the Admiralties Juriſdiction, by the Judge of the ſame, Sir *Leoline Jenkins*, in anſwer of whom was produced that *Great Good Man* the Lord Chief Juſtice *Hale*, who as well by Law poſitive as other his great Reaſons, ſoon put a Period to that Queſtion, which during his Days ſlept, and it may modeſtly be preſumed will hardly (if ever) be awaked.

It is called *Imperium*, becauſe it proceeds from the Authority of the Judge, and not from any right inherent in the Party. *Leg.* 1. §. *de Conſt. Princip.* Coke *lib.* 10. *fol.* 73. *in le Caſe del Marſhalſea.*

He that hath never ſo little to do with the Compaſs, though he ſits ſtill in his Place, does as much or more than all the other neceſſary Noiſe in the Ship; the Compariſon is quit of Arrogance, for it holdeth in the Deſign, it is not meant of the Performance.

And though I well know, that thoſe that ſpend their Time in brewing of Books, are by *Seneca* compared to petty Painters, that buſy themſelves in copying out Originals, having this half Verſe of *Horace* often thrown in their Teeth,

——*O imitatores ſervum pecus!*

Yet I have this Hope left, that my Faults and Flaws, like thoſe found in the Cuts of Diamonds, may at this time the eaſier eſcape under the Excellency of their Subject, or at leaſt under that of your Charity.

Charles Molloy.

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CHAP.

CHAP. I.

Of Dominion or Property in general, and of the Cauſes changing the ſame by War.

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XXV. *How dealt withal after ſeizure, by the Practice of antient and modern Ages.*
XXVI. *Whether lawful for a Chriſtian to aſſiſt an Infidel againſt a Chriſtian by the Laws of Nations, and by our Religion.*

I. NO ſooner had the Eternal Power created Man, but he beſtowed on him a Right over the things of this inferior Nature; nor was his Goodneſs leſſened upon the

Juſtin, lib. 43.

Reparation of the World after the Flood (*all things being then undivided and common to all, as if all had one Patrimony*) ſince every Man might then take to his uſe what he pleaſed, and make conſumption of what he thought good in his own Eyes; which uſe of the univerſal Right was then inſtead of Property: For what any one had ſo taken another could not without Injury take away from him.

A Theatre is common, yet the place poſſeſſed by any one, may be rightly called his own.

II. Nor was it impoſſible for that State to have continued, if Men through *great Simplicity* or *mutual Charity* had lived together; and this is inſtanced in thoſe *Americans*, who through many Ages have lived in that Community and Cuſtom, and the other of *Charity*, which the *Eſſenes* of old practiſed, and then the *Chriſtians* who were firſt at *Jeruſalem*, and at this Day not a few that lead an aſcetick Life: The Simplicity of our firſt Parents was demonſtrated by their Nakedneſs, there being in them rather an *ignorance of Vice, than a knowledge of Virtue*, their only Buſineſs being the Worſhip of God, living eaſily on thoſe things, which the Earth of her own accord brought forth without labour.

Juſtin, lib. 2. Ut de Scythis loquitur Trogus. Primum inter Homines mali neſcia & adhuc aſtutiæ inexperta ſimplicitas.

III. Yet in this ſimple and innocent way of Life, all Men perſiſted not, but ſome applyed their Minds to various *Arts*; the moſt antient of which were *Agriculture* and *Paſture*, appearing in the *firſt Brothers*, not without ſome diſtribution of Eſtates, and then from the diverſity of each Man's Actions aroſe *Emulation*, and then *Slaughter*; and at length, when the Good were infected with the Bad, a *gigantick Kind of Life*, that is, *violent*; but the World being waſhed by the *Flood*, inſtead of that fierce Life, ſucceeded the deſire of *Pleaſure*, whereunto *Wine* was ſubſervient; and thence aroſe *unlawful Loves*, but by *that more general Vice Ambition*, Concord was chiefly broken, after which Men parted aſunder, and ſeverally poſſeſs'd ſeveral parts of the Earth; yet afterwards, there remained amongſt Neighbours a communion not of Cattle, but of Paſtures; becauſe in the ſmall number of Men, ſo great was the Latitude of Land, that without any incommodity it might ſuffice to the uſes of many, until the number of Men, ſo of Cattle increaſing, Lands every where began to be divided; not among Nations as before, but among Families; an inſtance of which we have hourly before our Eyes in thoſe vaſt immenſities that are daily appropriating

Seneca Naturalium. 3. in fine.

Ne inſignare quidem aut partire limite campos Fas erat.

priating and planting in *America*: From hence we learn what was the cauſe for which Men departed from the primitive communion of things, firſt of *moveables*, and then of *immoveables* alſo; to wit, becauſe when not content to feed upon that which grew of itſelf, and the Earth ſingly brought forth, to dwell in *Caves*, *to go naked*, *or clad with rinds of Trees*, *or skins of Beaſts*; they had choſen a more exquiſite kind of Life, there was need of Induſtry, and uſing of Art in thoſe matters, which they ſhould give themſelves up to; ſo likewiſe from hence we learn, that Men not content to live in that innocent ſtate of community, how things went into Property, not only by the act of the Mind (for they could not know the thoughts of one another, what every one would have to be his own, that they might abſtain from it, and many might deſire the ſame thing) but by a certain *Covenant*; either *expreſs* as by diviſion, or *tacit* as by *occupation*: For ſo ſoon as Communion did not pleaſe them, and diviſion was not made, it ought to be ſuppoſed an agreement amongſt all, that every one ſhould have proper to himſelf what he ſeized on, * *for every one might prefer himſelf before another, in getting thoſe things uſeful for the accommodating of human Life, Nature not being repugnant to the ſame.*

Bodin. lib. 1. *cap.* 7.

Grotius de Mari libero, cap. 15.

* *Cic offic.* 1. *Addendum illud Quintiliani; Si hæc conditio eſt, ut quicquid in uſum hominis ceſſit, proprium ſit habentis, profecto quicquid jure poſſidetur, injuria aufertur. Macrobius Saturn. l.* 3. *c.* 12.

IV. And though Property may ſeem to have ſwallow'd up all that right which aroſe from the common ſtate of things, yet that is not ſo; for in *the Law of Dominion*, *extream neceſſities* ſeem excepted. Hence it is that in Navigation, if at any time Victuals fail, what every one hath, ought to be brought forth for the common uſe: And ſo in a Fire, I may pull down or blow up my Neighbour's Houſe to ſave mine; deſtroy the Suburbs, to raiſe Lines or Forts to preſerve the City thereby; dig in any Man's Ground for Salt Peter, cut in pieces the Tackling or Nets upon which my Ship is driven, if it cannot be diſintangled by other means: All which are not introduced neither by the *Civil Law*, nor the *Municipal Laws* of Countries, but are expounded by them, with their proper diverſities.

Leg. 2. §. *cum in eadem D. ad Leg. Rhod. Quo non fragm.* §. *Quod ait. D. incend. Leg. Quemadmodum* §. *item. D. ad l. Aquilam.*

12. *Ed.* 3. *tit diſtreſſ.* 170. 11. *H.* 7. 5. Reniger & Fogaſſa, Plowden *fol.* 1. *to* 10. Coke 3 *Inſtit. fol.* 83.

Bald. lib. 3. *de rerum diverſarum,* ſeems to have been of opinion, that by the Laws of Nations one may take Arms to abate the growing Power of his Neighbours. *Sed ut vim pati poſſe ad vim inferendam Jus tribuat, ab omni æquitatis ratione abhorret:* But that a poſſibility of ſuffering Force, ſhould give a right of offering of Force, this is far from all Equity, ſays the excellent *Grotius, lib.* 2. *cap.* 1. *ſect.* 27. *Ralegh*'s Hiſtory of the World, *p.* 678. *Grot. de jure belli & pacis, l.* 3. *c.* 6. *Sect.* 11, 12, 13, 14.

V. Nor is Property ſo far inſtated in Man, but the ſame may again be diveſted by ſuch means as ſtand with the Law of *Nature* and *Nations*; and firſt by War, the Cauſes of which are aſſigned to be three, *Defence*, *Recovery*, and *Revenge*.

But then ſuch War muſt be juſt, and he that undertakes it muſt be a *Sovereign :* The juſt cauſes to make a War are our *Prince*'s or *Country*'s defence, and that of our Allies, the Satisfaction of our Injuries, or theirs; our juſt Pretenſions to an Eſtate or Right; Divines have added another, not only the Defence of Religion, but its Advancement and Propagation, by the way of Arms, and ſome the extirpation and rooting up a contrary. Certainly War is too rough a Hand, too bad a Means, to plant Piety; *Sicut non Martyrem pœna, ſic nec fortem pugna, ſed cauſa*; *As it is not the puniſhment that makes the Martyr, ſo it is not fighting that declares a valiant Man, but fighting in a juſt cauſe*; in which whoſo ſhall reſolvedly end his Life valiantly, in reſpect of the cauſe, that is, in the Defence of his Prince, Religion, or Country, *ought to be numbered among the Martyrs of God.*

Ralegh, 680.

VI. Publick War is either *Solemn* by the Laws of Nations, or elſe leſs *Solemn*. What we here call Solemn is commonly called Juſt, in the ſame ſenſe as a juſt Teſtament is oppoſed to *Codicils*, not that it is not lawful for him that pleaſes to make Codicils, but becauſe a Solemn Teſtament hath by the Civil Law ſome peculiar effects; and this difference is worth Obſervation, ſeeing many miſunderſtanding the Word *Juſt* conceive all Wars to be condemn'd as unjuſt and unlawful, whereunto this Appellation of Juſt is not agreeable.

Ita inter cives erant quædam matrimonia non juſta, non juſti liberi. Paul. Sent. lib. 2. *tit.* 19.

For the more clear underſtanding of the foregoing Section we think it may be of uſe to abſtract Lord Chief Juſtice *Hale*'s ſenſe of this matter as follows,——Our Wars with foreign Countries have been either ſpecial or general: 1. Special, uſually called *Marque* or Repriſal, and theſe either particular, *i. e.* granted to ſome particular Perſons on particular Occaſions to right themſelves, vid. *Stat.* 2. *H.* 5, 7. Or, 2. general *Marque* or Repriſal

VI. Tha which

which though it hath the effect of a War, yet differs in theſe two inſtances; 1. regularly no Perſon may by aggreſſion take the Ship or Goods of the adverſe Party, without a Commiſſion; 2. the two Nations are not therefore in a perfect State of Hoſtility; though they mutually take from each other as Enemies; and many times theſe general Repriſals grow into a formed War. Such was the *Dutch* War 1664. *Hale's Hiſt. Pl. Cr.* 162.

A general War is either ſolemnly denounced, or not ſolemnly denounced; the former, when War is ſolemnly declared or proclaimed by our King againſt another State. Such was the *Dutch* War 1671, (and the preſent War with *Spain*.) An unſolemn War is when two Nations ſlip into a War without any ſolemnity; and ordinarily happeneth among us. Again, if a foreign Prince invades our Coaſts, or ſets upon the King's Navy at Sea, hereupon a real, though not a ſolemn, War may, and hath formerly ariſen. Such was the *Spaniſh* Invaſion in 1588. So that a State of War may be between two Kingdoms without any Proclamation or Indiction thereof, or other matter of Record to prove it. *Idem.* 164.

VII. That War, according to the Law of Nations, may be Solemn, two things are requiſite: Firſt, That it be waged on both ſides by his Authority who hath the higheſt Power in the Commonwealth. Secondly, That certain Rights be uſed (of which we ſhall ſpeak in due place) one of theſe without the other (becauſe they are both required) doth not ſuffice. Publick War leſs Solemn may want thoſe Rites, and be waged againſt private Perſons, and have for the Author any Magiſtrate. And according to the opinion of moſt Civilians, if the matter be conſidered without Civil Laws, it ſeemeth that every Magiſtrate hath right to wage War, as for the defence of the People committed to his Charge, ſo for the Exerciſe of Juriſdiction, if he be oppoſed by Force: But becauſe by War the whole Commonwealth is endangered; therefore by the Laws of all Nations that War be not undertaken without the Authority of him whoſe Power in the Commonwealth is the higheſt, there is extant ſuch a Law of *Plato*'s, and in the Roman Law it is called Treaſon in him who, without the Command of the Prince, hath waged War, or liſted Soldiers, or raiſed an Army; in the *Cornelian* Law brought in by *L. Cornelius Sylla* it was, *without the Command of the People*; in *Juſtinian*'s Code is extant a Conſtitution of *Valentinian* and *Valens*, *None have leave to take any Arms without our knowledge and direction.* And my Lork *Coke* in his Third Inſtitutes obſerves, That by the Common Law of this Realm it was High-Treaſon * to levy War

Ult. de Leg. l. 3.

D. ad leg. Jul. maj.

Fol. 9. *Le Roy doit de droit ſaver & defender ſon Realm vers Enemies, &c. F. N. B.* 113. *a.*

* See 1 *Hale's Hiſt. Pl. Cr. p.* 130, &c. and to the end of *Chap.* 14. for much good matter on this Point. It muſt be a levying War againſt

againſt the King, by the Statute; and it muſt be *in his Realm*. Therefore private Quarrels, tho' carried on *more guerrino* among the great Men, did not amount to the levying of War.

The Realm of *England* comprehends the narrow Seas. *Idem. page* 154.

War without Authority from the King, for to him it belongeth only. And the reaſon why it ſhould be ſo ſubjected is, becauſe that natural Order for preſerving of peace among Men requires that an Authority and Council in undertaking of War ſhould remain in Princes.

VIII. But as all Laws muſt be interpreted by Equity, ſo muſt this Law; and therefore there is no Queſtion but that 'tis lawful for one having Juriſdiction, by force of thoſe which we call a peaceable Guard or Power, *viz.* Conſtable, Serjeants, Watchmen, *&c.* to conſtrain a few diſobedient Perſons as oft as there's no need of greater Power to that purpoſe, and no imminent danger to the Commonwealth. Again, if it be ſo preſent a danger, that time will not admit of Conſultation with him who hath Supreme Power, here alſo neceſſity affordeth another Exception; and therefore in Garriſons, if the Townſmen ſhould endeavour to fall over to an Enemy, they may be dealt withal as Enemies by the Governor of the Garriſon, and by that Right *L. Pinarius* Governor of *Enna*, a Garriſon in *Sicily*, having information that the Townſmen were falling off to the *Carthaginians*, making ſlaughter of them kept the Town: And the reaſon why ſuch extraordinary Force is called War, is, for that the ſame is commenced by the right of the Magiſtrate, in which caſe the War is ſuppos'd to be made by the higheſt Power, becauſe every one is judged Author of that which he giveth another Commiſſion to do; beſides the univerſal reaſon which warrants the act, requires that all Dangers, Rebellions, and Inſurrections be withſtood and checkt in the very bud, and tho' this is called War, yet this ſtrictly is not properly War, tho' the Parties who ſuppreſs or puniſh are impune.

Our Author would be underſtood here of War within the Realm. But War ſolemn or unſolemn with Enemies out of the Realm, are both equally War. *See* 1. *Hale's Hiſt.* 163. ſhewed above, *Sect.* 6.

IX. But War properly by the Laws of this Realm or *Solemn*, is, when the Courts of Juſtice are ſhut up, and the Judges and Miniſters of the ſame cannot protect Men from violence, nor diſtribute Juſtice: So when by *Invaſion*,

Inſurrection,

Inſurrection, *Rebellion*, or the like, the current of Juſtice is ſtopt and ſhut up, *Et ſilent leges inter arma*, then it is ſaid to be time of War, and the Trial of this is by Records and Judges of the Courts of Juſtice, and not by a Jury. So likewiſe War by the Laws of *England* is when the King's Standard and Hoſt enter the Realm of another Prince or State, and hath been there by the ſpace of Forty Days, for till then the War is not properly ſaid to be begun.

14 *Ed.* 3. *tit. Scire facias* 122. *inter Mortimer* and the Earl of *Lancaſter.*

Trin. 7 *Ed.* 3. *fol.* 29.

X. Wars, though undertaken by publick Authority, muſt have the Effects of Law, that is, there muſt be a juſt cauſe for the undertaking the ſame; ſo that *Alexander*, for that without cauſe he warred upon the *Perſians* and other Nations, is by the *Scythians* in *Curtius* and by *Seneca* too deſervedly called a Robber. For take away Juſtice, and what are Kingdoms but great Robberies? Therefore the juſt cauſe of taking Arms muſt be the Iniquity, or, as we underſtand it, the Injury of the adverſe Party, according to the Words uſed in the antient Denunciation of the Roman Heralds, * *I call you to witneſs, that People is unjuſt, and doth not perform what is Right.* Now that is unjuſt which hath a neceſſary repugnance to the rational and ſocial nature. Now amongſt the firſt principles of Nature there is nothing neceſſarily repugnant to War, there is much in favour of it; for the end of War, the conſervation of Life and Members, and the keeping or acquiring of things uſeful unto Life is moſt agreeable unto thoſe Principles: And if need be, to uſe Force to that purpoſe is not diſagreeable, ſince every thing hath by the Gift of Nature ſtrength, to the end it may be able to defend and help itſelf, and therefore *he is by Nature fitted for Peace and War; though coming into the World unarmed, yet he hath a Hand fit to provide and handle Arms.* Moreover right Reaſon and the Nature of Society inhibits not all Force, but what is repugnant to Society, that is, which depriveth another of his Right; for the end of Society is, that by mutual Aid every one may enjoy his own. And this were ſo, although the Dominion and Propriety of Poſſeſſions had not been introduced; for Life, Members, Liberty would yet be proper to every one, and therefore could not without Injury be invaded by another, and to make uſe of what is common, and to ſpend as much as may

Grot. de jure belli et pa. lib. 2. *c.* 1. §. 1.

Seneca de benefic. 1. *c.* 13.

* *Ego vos teſtor, Populum illum injuſtum eſſe, neque jus perſolvere.*

may ſuffice Nature, would be the right of the occupant, which right none without Injury could take away: And that is made evident, ſince by Law and Uſe, Dominion is eſtabliſhed, and that appears by the Orator, *Ut ſi unumquodque membrum ſenſum ſuum haberet, ut poſſe putaret ſe valere ſi proximi membri valetudinem ad ſe traduxiſſet, debilitari & interrire totum corpus neceſſe eſt*: And applying that, ſays, *So if every one of us ſnatch unto himſelf the commodities of other Men, and draw away from every one what he can to advantage himſelf, human Society cannot ſtand, Nature gives leave to every Man, in the acquiſition of things uſeful, to ſupply himſelf before another: But by the Spoils of another to increaſe his own Store, that Nature doth not permit.* It is not then againſt Society to provide for one's ſelf, ſo that another's right be not diminiſhed; nor is that violence unjuſt which doth not violate the Right of another. Of the two kinds, Contention by debate and by force, the one agreeing to Men, the other more becoming Beaſts, we muſt fly unto the latter when the former would not ſerve. The incomparable *Ulpian* ſays, *Caſſius writes that it is by Nature lawful to repel Force by Force, and Arms by Arms.* And this is further proved out of Sacred Hiſtory; for when *Abraham* having armed his Servants and Friends, purſued the four Kings that ſpoiled *Sodom*, and returned with Victory and Spoil of the Enemy, God by his Prieſt *Melchiſedeck* approved his Action, *Bleſſed be the moſt High God*, ſaid *Melchiſedeck*, *who hath delivered thine Enemies into thine Hand.* Abraham, as appears by the Story, had taken Arms without any ſpecial Commiſſion from God; therefore the Law of Nature was his Warrant, whoſe Wiſdom was no leſs eminent than his Sanctity; nay, God himſelf hath preſcribed to his People general and perpetual Laws of waging War, thereby ſhewing that Wars may be Juſt, even without his ſpecial Mandate; for he doth plainly diſtinguiſh the Cauſe of the ſeven Nations (in which God gave a ſpecial Mandate for the deſtroying of them, which is properly called the Wars of God, and not of human Counſel) from the Cauſe of other People, and preſcribing nothing about the juſt Cauſes of entring into War, thereby ſhews them to be manifeſt enough by the Light of Nature, as the cauſe of the defending of the Frontiers in the Wars of *Jephtha* againſt the *Ammonites*, and

Tully's Offic. 3.

Leg. 1. *ſect. vim vi. D. de vi, & vi. armata. a.*

Gen. xiv. 18.

the cauſe of Embaſſadors violated in the Wars of *David* againſt the ſame People.

XII. By the Law of Nature, in War thoſe things are acquired to us, which are either equal to that, which being due unto us, we cannot otherwiſe obtain, or elſe is ſuch a mark as does infer Damage to the guilty Party by a fit meaſure of Puniſhment; and by the Laws of Nations, not only he that wages War on a juſt Cauſe, but every one in ſolemn War, and without end and meaſure, is Maſter of all he taketh from the Enemy in that Senſe, that by all Nations, both himſelf and they that have Title from him, are to be maintained in the Poſſeſſion of them; which as to external Effect we may call Dominion; *Cyrus*, in *Xenophon*, *It is an everlaſting Law among Men, that the Enemies City being taken, their Goods and Money ſhould be the Conquerors*; for the Law in that matter is a common Agreement, whereby the things taken in War become the Takers. From the Enemy are judged to be taken away thoſe things alſo which are taken away from the Subjects of the Enemy, and Goods ſo taken cannot by the *Law of Nations* be properly ſaid taken, but when the ſame are *out of all probable hopes of recovery*, that is, as *Pomponius* obſerves, *brought within the bounds or guards of the Enemy*; *For*, ſays he, *ſuch is a Perſon taken in War, whom the Enemies have taken out of our, and brought within their Guards, for till then he remains a Citizen.* And as the Law of Nations is the ſame reaſon of a Man, ſo likewiſe of a thing; and therefore Goods and Merchandize are properly ſaid to be the Captor's, when they are carried *Infra Præſidia* of that Prince or State, by whoſe Subjects the ſame were taken, or *into the Fleet, or into a Haven, or ſome other place where the Navy of the Enemy rides*: For then it is that the recovery ſeems to be paſt all hope. And therefore the *common Law* of this Realm calls ſuch a taking a *Legalis Captio in Jure Belli*, and in 7 *R.* 2. an Action of Treſpaſs was brought for a Ship, and certain Merchandize taken away, the Defendant pleaded that he did take them in le haut Mere ou les Normans queux ſont Enemies le Roy: And it was adjudged that the ſame Plea was good. And, in the Year 1610. a Merchant had a Ship and Merchandize taken by a *Spaniard*, being an Enemy; a Month after a Merchant Man,

Xenoph. 5. *de Inſtit. Cyri.*

Ariſt. 1. *Polit.*

Hujuſmodi res non tam capta quam recepta intelligitur, per D. per. Pomponius & *Leg. in Bello Parag. Si quis ſervum in par. de capt.* & *poſt.*

1. *Hale's Hiſt. Pl. Cr. p.* 163.

2 *R.* 3. *fol.* 3. 7 *R.* 2. Treſpaſs *Statham Pl.* 54.

M. 8. *Jac. B.R.* 2 *Brownlow* 11. 7 *Ed.* 4. 14. *a.* 24. *Ed.* 3. 16, 17. *Lucas,* 79.

Man, with a *Ship* called *The little Richard*, retakes her from the *Spaniard*: It was adjudged, that ſuch a poſſeſſion of the Enemy, diveſted the Owner of his Interreſt, and the retaking afterwards in *Battle*, gained the Captors a Property.

1. *Hale's Hiſt. Pl. Cr. p.* 163.

* *Conſulatu Maris, c.* 283. 287. *Conſtit. Gallicæ, l.* 20. *tit.* 13. *art.* 24.

7 *R.* 2. Treſpaſs *Statham Pl.* 54.

XIII. 'Tis true, the Civilians do hold, That it is not every Poſſeſſion that qualifies ſuch a Caption, and makes it become the Captor's; but a firm poſſeſſion (that is) when the Prize doth *pernoctare* with the Enemy, or remain in his poſſeſſion by the ſpace of 24 Hours; but as this is a new * Law, ſo it is conceived to be againſt the antient Judgments of the Civil Law, as well as the modern Practice of common Law: For the Party in the antient Precedents doth not mention by his Plea, that the Prize did *pernoctare* with the Enemy, but generally, that the ſame was gained by Battle of the Enemy.

XIV. This right of changing of Dominion or Property by force of Arms, is ſo odious, that in the taking of Goods, if by any poſſibility the right Owners may have reſtitution, the ſame hath been done. And although a larger time than 24 Hours happens between the capture and recapture, and ſo it may *pernoctare* with the Captor, yet reſtitution may be made; and therefore if one Enemy takes the Ship and Merchandize of another Enemy, and brings her into the Ports or Havens of a *Neuter Nation*, the Owners may ſeize her, and the *Admiral* of that *Neuter Nation* may in ſome caſes reſtore the Ship and Goods to their Owners, and the Perſons captive to their former liberty; the reaſon is, for that the ſame ought to have been brought *infra Præſidia* (a) of that Prince or State by whoſe Subject ſhe was taken.

(a) *Res quæ intra præſidia perductæ nondum ſunt, quanquam ab hoſtibus occupatæ, Dominum non mutârunt ex Gentium jure. Grotius de jure Belli ac Pacis, l.* 3 *c.* 9. §. 16.

(b) *March, Rep.* 110.

A *Dunkirker* having ſeized a *Frenchman*'s Veſſel, *ſuper altum Mare*, ſold the ſame with her lading at *Weymouth*; whither it had been driven before ſhe was brought *infra Præſid. Dom. Reg. Hiſpaniæ*: The *Frenchman* coming into Port, there claims the benefit of the Laws of Nations, the King of *England* being then in amity with both their Princes, and that reſtitution be made; in which caſe it was reſolved by all the Judges, (b) That if there be a Caption by Letters of *Marque*, or *Piracy*, and the Veſſel and Goods are not brought *infra Præſidia* of that Prince or State, by whoſe Subject the ſame was taken, the ſame will

will not diveſt the Property out of the Owner; with this agrees the Law Civil, and reſtitution may be made. For this is not an abſolute property immediately veſted in the Captor upon the taking; but a conditional property to anſwer the original Debt or Damage, which cannot be done without a judicial Adjudication, the opportunity of which he hath loſt by bringing the Prize into the Country of another Prince: For, as to private War, their Countries are as an Aſylum.

Per leg. libertas, & de leg. Jur.

XV. But if the Ships of War of Nations in enmity meet at Sea, and there be a caption, if there be that which is called *a firm poſſeſſion*, the *Neuter Nation* cannot re-deliver or make reſtitution of the thing ſo acquired: And ſo it was adjudged, where *Samuel Pellagii* with a Ship of War of the Emperor of *Morocco*, took a *Spaniſh* Ship, and brought the ſame into *England*, that he could no ways be queſtioned for the ſame *criminaliter*, or reſtitution to be made *civiliter*; for that the King of *Spain* and the *Morocco* Emperor were Enemies, and the King of *England* in Amity with both, and that ſuch a caption is not called *Spoliatio, ſed legalis captio*, in which there can be no reſtitution made, upon neither of the Statutes of 31 *H.* 6. *cap.* 4. or 27 *Ed.* 3. *cap.* 13. for he that will ſue to have reſtitution in *England* for Goods taken at Sea, muſt prove, *That the Sovereign of the Party was in amity with the King of* England. Secondly, *That he that took the Goods, his Prince was at the time of the taking in amity with the Sovereign of him whoſe Goods were taken.* For if he which took them, was in enmity with the Sovereign of him whoſe Goods were taken, then the ſame will not amount unto a depredation or robbery, but a lawful taking, as every Enemy might take of another.

1 *Ro. Rep.* 175. 3 *Bulſtrod.* 28. The getting of Letters of Repriſal againſt a Nation, does not make a War between both States; nor can they be ſaid to be at Enmity. 22 *E.* 3. *fol.* 13. *Coram Rege & Concilio ſuo in Camera Stellarum Michael.* 2 *R* 3. *fol.* 2. *A.*

A *Spaniſh* Merchant, before the King and his Council, *in Camera Scaccarii*, brought a Bill againſt divers *Engliſhmen*, wherein ſetting forth *quod deprædatus & ſpoliatus fuit*, upon the Sea, *juxta partes Britanniæ per quendam Virum Bellicoſum de Britannia, de quadam Navi*, and of divers Merchandizes therein, which were brought into *England*, and came into the Hands of divers *Engliſhmen*, naming them, and ſo prayed proceſs againſt them, who came in, and pleaded, that in regard this depredation was done by a Stranger, and not by the Subjects of the

7 *E.* 4. 14. 13 *E.* 4. 9. 22 *E.* 3. *fol.* 23. 2 *R.* 3. *fol.* 2.

King

27 E. 3. c. 13. 31 H. 6. c. 4. 3 Bul. 28. 1 Ro. Rep. 175.

King of *England*, they ought not to anſwer. It was there reſolved, *Quod quiſquis extraneus*, who brings his Bill upon this Statute to have reſtitution, *debet probare quod tempore captionis fuit de amicitia Domini Regis*; and alſo, *quod ipſe qui eum ceperit, & ſpoliavit, fuit etiam ſub obedientia Regis, vel de amicitia Domini Regis, ſive Principis quærentis, tempore ſpoliationis, & non Inimicus Domini Regis, ſive Principis quærentis: Quia ſi fuerit inimicus, & ſic ceperit bona, tunc non fuit ſpoliatio, nec depredatio, ſed legalis captio, prout quilibet inimicus capit ſuper unum & alterum.*

Hujuſmodi res non tam capta, quàm recepta intelligitur: per D. Leg. Pomponius, & per Leg. in Bello Par. ſi quis ſervum in pr. de Cap. & poſt.

But if the King of *England* is in enmity with the *States of Holland*, and one of their *Ships of War* takes a Merchant-Man of the King of *England*'s, and afterwards another *Ship of War* of *England* meets the *Dutchman* and his Prize, and in *aperto prælio*, regains the Prize, there reſtitution is commonly made, the Owners paying the *Salvage*: So where the Prize is recovered by a *Friend in amity*, or comes into his *Ports*, reſtitution is likewiſe made; but when ſuch Goods become a lawful and juſt prize to the Captor, then ſhould the *Admiral* have a tenth part; following the religious example of *Abraham*, after his Victory over the five *Kings*.

Per Leg. poſtliminii, Par. Poſtliminii. de Capt. & poſtli.

Boyce & Cole, verſ. Claxton, Hill. 26, & 27 Car. 2. in B. R. Reſtitution made formerly by a *French-Man*, who had regained an *Engliſh* Prize out of the Hands of a *Dutch* Man of War.

XVI. He that is an Enemy, may every where be aſſaulted, according to the Laws of Nations. Enemies may therefore be attacked or ſlain on our Ground, on our Enemies, or on the Sea; but to aſſault, kill, or ſpoil him in a *Haven* or *peaceable Port*, is not lawful; but that proceeds not from their Perſons, but from his right that hath *Empire* there, for Civil Societies have provided that no force be uſed in their Countries againſt Men, but that of Law, and where that is open the right of hurting ceaſeth. The *Carthaginian Fleet* was at Anchor, in *Syphax* Port, who at that time was at Peace with the *Romans* and *Carthaginians*; *Scipio* unawares fell into the ſame Haven, the *Carthaginian Fleet* being the ſtronger, might eaſily have deſtroyed the *Romans*; but yet they durſt not fight them. The like did the *Venetian*, who hindered the *Greeks* from aſſaulting the *Turkiſh Fleet*, who

Sir *Walter Ralegh, l. 5. c. 3. §. 17.*

rid

rid at Anchor in a Haven, then under the Government of that *Republick*; ſo when the *Venetian* and *Turkiſh Fleet* met at *Tunis*, though that very Port acknowledges the *Ottoman* Emperor; yet in regard they are in the nature of a *Free Port* to themſelves, and thoſe that come there, they would provide for the peace of the ſame, and interdicted any hoſtile attempt to be made there.

The *Corſairs* having been in the *Gulph*, put into the Port of *Vallona*, which is ſubject to the Turk; whereupon *Capello*, Proveditor-General for the *Venetian*, and Captain of the Gulph, having notice of the ſame, made into the Port; and though the *Ottoman Port* had by Treaty permitted the *Venetian* to purſue the Pirates in all Places, and forbad their Commanders to protect or ſhew them any Favour, yet the Caſtle interdicted, and forbad the *Venetian* General with Cannon to attack them; for it was nevertheleſs intended by the Treaty that the Peace of Ports muſt be preſerved.

History of the Republick of *Venice* in *Anno* 1638. and *fol.* 447.

And the ſame Republick having War with thoſe of *Genoa*, met, at *Tyre*, *Reinerius Zenus* Duke of *Venice* with the united Power of the *Venetians* and *Piſans*, counting no fewer Number than 74 Veſſels well provided, and would have engaged in the very Haven, but were there interdicted by the Governor; but yet with this Proviſo, that if by conſent they would go out of the Protection of the Port, and at open Sea decide the cauſe, they had then freedom: And accordingly they ſailed forth and engaged. The like not long ſince happened between *Cornelius de Wit*, Commander of a Ship of War of the *States General*, and Captain *Harman*, Commander of one of His Majeſty's Frigates at *Cales*, a Challenge being made in that Port by the firſt, and as briſkly accepted by the latter, but both were interdicted the execution of the ſame in the Port, but out of the protection of the ſame they might decide the Queſtion; the which they did to the no ſmall Fame of the laſt; for in that diſpute, of 380 Men then aboard the *States* Man of War there were ſcarce 100 whole Men in her, and *Harman* having entered and taken her, brought her at his Stern in Triumph to the Port again.

Fuller's Holy War, *l.* 4. *c.* 23.

Jan. Anno 1672.

But they of *Hamburgh* were not ſo kind to the *Engliſh*, when the *Dutch Fleet* fell into their Road, where rid

at

Anno 1665, 1666. *Bell. Angl. cum Batav.*

at the ſame time ſome *Engliſh* Merchant-Men, whom they aſſaulted, took, burnt, and ſpoiled; for which Action, and not preſerving the Peace of their Port, they were by the *Law of Nations* adjudged to anſwer the damage, and I think have paid moſt or all of it ſince. But Enemies in their own *Ports* may be aſſaulted, burnt, or deſtroyed by the Laws of Arms.

This is *Jus belli, & in Republica maxime conſervanda ſunt Jura Belli. Reg. fol.* 129. *Arreſt fact ſuper bonis Mercator. alienig.*

XVII. If the Ships of any Nation happen to arrive in any of the King of *England*'s Ports, and afterwards, and before their departure, a War breaks out, they may be ſecured, privileged without harm of Body or Goods; but under this limitation, till it be known to the King, how the Prince or Republick of thoſe, whoſe Subjects the Parties are, have *uſed and treated thoſe of our Nation in their Ports*. But if any ſhould be ſo bold as to viſit our Ports after a War is begun, they are to be dealt with as Enemies.

Grot. de Jure belli & pacis lib. 3. *c.* 11. *Sect.* 12.

Some of old have held that *Clericus, Agricola & Mercator tempore belli ut colat, commutet, oretque pace fruuntur*

XVIII. By the Laws of Nations generally all things are the Captor's which he takes from his Enemy, or which his Enemies gained from another by Force of Arms; ſo likewiſe all thoſe Goods that he ſhall find in his Enemies cuſtody: But then it muſt be apparently manifeſt, and evidently proved, that is really the Enemies; for if an *Engliſh-Man* ſhould have Goods in the cuſtody of a *Dutch Factor* at *Cales*, and a War ſhould break out between that *Prince* and that *Republick*, yet are not the Goods of the *Engliſh-Man* ſubject to the ſeizure of the *Spaniard*, it being apparent, that the Owner is not a Subject of their Enemies: So likewiſe if the Goods of *Friends* are found in the Ships of *Enemies*, this does not *ipſo facto* ſubject the ſame to be *prize* by the Laws of Nations; though it be a violent preſumption, and may juſtly bear a legal examination, till which there may be a ſecuring of the prize, till adjudication ſhall paſs. So on the other had, if the Ships of *Friends* ſhall be freighted out to carry the Goods of *Enemies*, this may ſubject them to be *prize*, eſpecially if the Goods ſhall be laden aboard *by the conſent or privity of the Maſter or Skipper*; though in *France* they have ſubjected and involved the innocent with the nocent, and made both of them *prize*.

Co. 2. Inſtit. *fol.* 58.

Conſul. Marit c. 273.

Hoſtis ſit ille, & qui intra præſidia ejus ſunt: Let him be our Enemy, and they that are within his Guards. *Liv. lib.* 37. *& alibi paſſim.*

prize. In the late *Flemiſh* Wars with *England*, the *Oſtenders* became obſequiouſly ſerviceable with their Ships to the Traffick and Commerce of both Nations. Memorable was the Action, when the War was between the two Republicks, *Venice* and *Genoa*, the *Grecian* Ships being then employed, (as thoſe of *Oſtend*) were ſearched, and the Enemies pulled out, but no other matter done: However it is moſt certain, let the *Commiſſion* or *Protection* of ſuch Ships be what they will, if Men will venture to trade under ſuch a Cloak, it behoves them, that the *Skipper* and his *Crew* be entirely ignorant; for it is his action that will go far in the freeing, or making abſolute the Prize, and Goods ſo made prize, the property is immediately gone and changed, be the Owner who he will, he never can claim the ſame; for the Laws of Nations *made the Enemies firſt Maſters by External Dominion, and then by Conqueſt gave the property to the Captor:* Following that Judgment of the *Romans*, *Whatſoever they got of their Enemies by Valour, they would tranſmit to their Poſterity by Right.*

Gregor. lib. 9.

Romani nos honeſtiſſimas eas atque juſtiſſimas credimus poſſeſſiones quas Belli Lege captas habemus; neque verò induci poſſimus ut ſtulta facilitate deleamus virtutis monumenta, ſi eas illis reddamus, quibus ſemel perierunt: Imo vero tales poſſeſſiones, non tantum cum his qui nunc vivunt civibus noſtris communicandas; ſed & poſteris relinquendas cenſemus: Tantum abeſt ut parta relinquendo in nos ipſos ea conſtituamus, quæ in Hoſtes conſtitui ſolent: Titus Largus his opinion in the Senate of Reſtitution: We *Romans* believe thoſe poſſeſſions to be moſt honourable and juſt, which we have taken by the Law of War; nor can we be induced by a fooliſh Facility to part with the Monuments of our Valour, and reſtore them to thoſe that were not able to keep them; nor do we judge ſuch poſſeſſions to be communicated only to our Country-Men now living, but to be left to our Poſterity. So far are we from relinquiſhing what we have got, and dealing with ourſelves, as if we were our own Enemies. *De Veij idem in Romulo narrat Plutarchus.*

XIX. 'Tis not againſt Nature to ſpoil the Goods of him, *whom it is lawful to kill*; and by the Laws of Nations it is permitted that the Goods of Enemies may be as well ſpoiled as taken; and *Polybius* obſerves, That all things of the Enemies may be ſpoiled, their Ships, Goods, Forts, &c.

Hiſt. 5.
Grot. de jure belli & pacis, lib. 3. *c.* 12. §. 1.

XX. And though it may happen ſometimes that a War may break out, and there may be no publick denouncing or proclaiming the ſame; that if a Friend or Neuter ſhould aſſiſt an Enemy with *Contraband Goods*, that is,

Owen. 45. but *quære* of that Caſe.

is, Arms, &c. whether upon ſuch a caption the Good may be made prize; the reſolution of which will depen on theſe Conſiderations.

Grotius, lib. 3. *cap.* 3. §. 2, 3.

Firſt, By natural Law, *where either force offered, is re pelled, or puniſhment exacted of one that hath offended, an is denied,* there needs no denunciation; for Princes ar not to ſtand debating with Words and Arguments, bein injured beyond Words: *For War undertaken to reſiſt vio lence, is proclaimed not by an Herald, but by Nature:* Fo it is no more than the invading of one for another, o taking of the Goods of the Debtor, to anſwer the Creditor's damage.

Vid. Marianam 27. 13. 1 *Hale's Hiſt. Pl. Cr. p.* 161, 162, &c.

Secondly, *Interpellation* is introduced by the Laws of Nations, whereby Princes or Republicks having received injuries, may apparently ſhew that they had no other way to recover their own, or that which is due to them: For ſuch *Interpellation* following after injuries committed, conſtitutes that Prince or State in a fault *that ſhall not render ſatisfaction.*

Denunciation is either conditionate or pure: Conditionate where it is joyned with remanding of things, and in the name of *res repetitæ* the Heralds Law, called *Jus feciale*, comprehended not only vindication by right of Dominion, but alſo the proſecution of that which is due upon a civil or criminal Cauſe. *Severus.*

Thirdly, Admitting that *Interpellation* hath gone, and ſatisfaction hath been required for the damage, and no ſatisfactory return hath been made, whether then the Ships or Territories of the Enemy may be aſſaulted: And for that it has been conceived they may, for denunciation is no more but to ſignify that the Parties, againſt whom the ſame is commenced, *are unjuſt and will not do right, and therefore War is begun by the Supreme Power.* Now Princes or Republicks having done that which by the Law of Nature they were not obliged to do, that is, after a wrong done, abſtained from War by Friendly demanding of Satisfaction or Reparation (which is required only by the Laws of Nations) and publick Juſtice being denied them, there remains no other or further obligation on the State, the ſame amounting to, and indeed is an apparent *defiance*; and *Proclamation* is no other.

—— *ad* 10. *Æn.* explains it rightly thence was that in the Forms *to be rendered, to be ſatisfied, to be yielded,* where to be yielded, as

XXI. True it is, that while the *Romans* were uncorrupted in their Diſcipline, they were religiouſly ſcrupulous in

as we have ſaid elſewhere is to be underſtood, unleſs they that are called upon will rather puniſh the guilty themſelves: This requiring of things *Pliny* teſtifies was named Clarigation, *lib.* 8.

in beginning a War; for they never ſent forth their Armies till they had ſought for Juſtice in the tracts of Peace, and after the publick promulgation of their intent. Such alſo was the integrity of the *Achæans*, before they had forewarned the Enemy to a defence. *Machiavel* commends the ſimplicity of the Antient *Florentines*, that enterprized no Hoſtility on their Neighbours till they had by ringing a Bell for the ſpace of a whole Month, ſummoned them to a peaceable ſatisfaction or a brave reſiſtance: But theſe Cuſtoms and Inſtitutions are only of ſome Countries, not from the Law of Nations. The white Rod among the *Greeks*, the Turfs and Bloody Spear among the *Equicolæ*, renunciation of Friendſhip and Society (if there had been any) thirty ſolemn days after ſatisfaction demanded, * are rather introduced by that which we call the Cuſtom or Law of particular Kingdoms and States; for there may be War no Queſtion introduced, without any ſolemn Proclamation, as the violation of Ambaſſadors by approbation of publick Authority is an open denunciation of War, and upon the ſame Reaſon *Guſtavus Adolphus* invaded † the *German* Empire, without ever declaring War, to revenge the contumelious uſage of his Ambaſſadors at *Lubeck*. The form of denunciation of War is either conditional, or abſolute; Conditional, when reſtitution or ſatisfaction is demanded at the ſame time that the War is denounced. A pure or abſolute denunciation, is that which eſpecially is called an Indiction or Proclamation, which is either when the other Party hath already begun the War, or when he himſelf hath committed that which deſerves to be puniſhed. *See Examples, Grot. lib.* 3. *c.* 3, 8, 7.

* The throwing of the Spear, and ſuch ſort of Cuſtoms which did not belong to the Law of Nations, in proceſs of time became obſolete; nay the third *Punick* War was at once indicted and begun. *Varro, lib.* 4. *de l.*

† *Phil. Arlanibæus Arma Suecica, fol.* 13, 37.

Zouch *de Jure Feciali, part.* 2. *ſect.* 10. *qu. An bellum aliquando citra indictione movere liceat?*

XXII. But if War be indicted, or is begun, againſt him who hath the higheſt Power over the People, it is ſuppoſed to be proclaimed againſt all his, not only Subjects, but thoſe who will join themſelves unto him, as

being an acceſſion to his party. And this is that which the Law interprets, *the Prince being defied, his adherents alſo are defied*; for to proclaim a War is to defie, which is to be underſtood of that ſame War which is waged againſt him to whom it is indicted, as when War was denounced againſt *Antiochus*, they were not pleaſed to denounce it againſt the *Ætolians* apart becauſe they had openly joined themſelves with *Antiochus*: The Heralds anſwered, *Ætolians have declared War of their own accord againſt themſelves*; but that War being ended, if another People or King, for ſupply of Aids, is to be warred againſt, that the effects of the Laws of Nations may follow, there will be need of a new Indiction, for now he is not lookt upon as acceſſary, but principal: Wherefore it is rightly ſaid, That by the Law of Nations, neither the War of *Manlius* upon the *Gallo-Greeks*, nor of *Cæſar* upon *Arioviſtus* was lawful. For they were not aſſaulted now as an acceſſion of a Neighbour's War, but principally: To which purpoſe, as by the Law of Nations Indiction, ſo by the Roman Law a new Command of the Roman People was neceſſary. For what was ſaid in the propoſal againſt *Antiochus*: *Was it their Will that War ſhould be entered with King* Antiochus *and thoſe that followed his Party* (which was obſerved alſo in the Decree againſt King *Perſeus*) ſeems truly underſtood ſo long as the War continued with King *Antiochus* or *Perſeus*, and thoſe that really immixed themſelves in that War.

Diffidato Principe, diffidati ſunt ejus adhærentes. Baldus ad Leg. 2. *C. de Serv. n.* 70.

Liv. lib. 36.

Idem dici poteſt de bello ſociorum Ulyſſis in Cyconas Priamo quondam auxiliatos, de quibus Hom. Odyſſ. 1. *&* *ibi Didymus.*

Livius, lib. 36, 42.

XXIII. Now the true Reaſon wherefore Nations required Denunciation to that War which was ſaid to be juſt by the Law of Nations, was not that Force ſhould not be offered privily, or carried on by deceit, for that pertains more to the excellency of their Valour than to ſtrict Right; (for ſome Nations (as we have read) have appointed their Enemy the time and place of Battle) but that it might certainly appear the War was not waged by a private undertaking, but by the will of either people or their Heads. *Servius Honoratus* when he had deduced the Original of the Heralds Law from *Ancus Manlius*, and further from the *Equicolæ*, ſaith, *That if at any time Men or Beaſts were by any Nation taken from the People of* Rome, *the* Pater Patratus *went with the Heralds* (that is, Prieſts) *who have Authority in making Leagues,*

nd *ſtanding before the Bounds, with a loud voice pronounced the cauſe of the War; and if they would not reſtore the things taken, or deliver up the Authors of the Injury, he threw a Spear, which was the beginning of the fight*, and thenceforth it was lawful, after the manner of War, to take the ſpoil.

Tùm certare odiis, tum res rapuiſſe licebit.

XXIV. War is not only lawful againſt thoſe that re our Enemies, but likewiſe againſt thoſe that ſupply them; but yet we muſt diſtinguiſh of the things themſelves. For ſome things there are that have uſe only in War, as Arms: Some that have no uſe in War, as thoſe hat ſerve for pleaſure: Some that have uſe both in War nd out of War, as Money, Corn, Victuals, Ships and hings belonging thereto.

1. It is plain, that by the firſt he is my Enemy that upplies my Enemies with things neceſſary for the War.

2. But by the ſecond he is not, according to that of Seneca: *I will not help him to Monies to pay his Guards; but if he ſhall deſire Marbles and Robes, ſuch things hurt not others, only they miniſter to his Luxury: Soldiers and Arms I will not ſupply him with; if he ſhall ſeek for Players and Recreations to ſoften his fierceneſs, I will gladly offer to him: Ships of War I will not ſend him, but ſuch as are for Pleaſure and Oſtentation of Princes ſporting in the Sea.* I will deny to give to one that purpoſes the deſtruction of another's Country thoſe things that are eſſential, for it is a bounty not to be allowed of.

French and *Dutch* in enmity, and the *Engliſh* neuter with both, the latter permitted the *French* King to build a Veſſel of Pleaſure at *Portſmouth*, which was ſent into *France*, and was no breach of the Neutrality, *Anno* 1676.

3. But in the third, which is a doubtful uſe, there the ſtate of the War is to be conſidered: For if I cannot defend myſelf unleſs I intercept the things ſent, neceſſity will then give right, but with the Burden of Reſtitution *, except ſome other cauſe accede; but if the apportation of thoſe things hinders the execution of my right, and he could know ſo much who brought them, as if I had driven the Enemies Fleet into a Port or Haven, or had ſtraitened a Town with a Siege or Blockade, and were now in expectation of their yielding or compounding, there is no queſtion but he that ſhall in ſuch caſe ſuccour my Enemy, ought in Juſtice be made liable for the Damage I have ſuſtained through his means;

* *Grotius in jure belli & pacis, lib.* 3. *c.* 1. §. 5.

The *Engliſh* drive the *Dutch Eaſt-India* Fleet into *Bergen*, and the *Dane* there protect-

ed them againſt the League and the Laws of Nations, for which the enſuing War was accounted juſt on the King of *Britain*'s part. *Sylv. in verb. Reſtitut. p. 3. §. 12.*

means: Like a Goaler that ſhall wilfully ſuffer my Priſoner to eſcape; or one that hath reſcued my Debt justly detained by me for my damage, whereby I am injured, and according to the meaſure of my loſs I Goods alſo may be ſeized and brought into ſuch a ſta to the end I may obtain a juſt ſatisfaction. But if hath not yet done any damage, but hath been willi to do it, there will be a right by retention or ſtayi of the Ship and Goods to compel him to give cauti for the future; but if my Enemies injuſtice towards r be moſt evident, and a Nation that ought to be Neu confirm him in that moſt unjuſt War, in that caſe will not only Civilly be liable, but Criminally as o that reſcues a Pirate manifeſtly guilty from the Judge the very Bar; and therefore it will be lawful to dete mine againſt him by ſuch meaſures as are neceſſary a meet for his Offence: Wherefore within thoſe rules, may be ſpoiled of Ship and Lading; and that is t true reaſon why Indiction or publick Proclamation internal right ought to be denounced, that ſo other N tions may ſee they have a juſt cauſe who commenced t War, and that they ought not to be impeded in the a quiring due ſatisfaction.

And though Neuters are not compellable, by the r gour of War, to afford Aſſiſtance to either Party witho the Will of the other, yet ſuch may the emergen of the caſe be, that if enforced, they may lawfully d clare, though to the damage of the weaker. Such w the caſe, when the *Venetians* had ſo far prevailed gainſt the *Turks* in *Candia*, that *Canea* which they th beſieged by Sea and Land, was brought to that extr mity that in all human probability it muſt then ha been ſpeedily ſurrendred, the *Engliſh* Ships being th at *Smyrna*, and preſs'd by the *Turk* to aſſiſt the *Gra Signior* in the relief of that City. If the Perſons who the *Engliſh* had thus aſſiſted, had been Chriſtians, the is no queſtion this Auxiliary Aid had been well; but aſſiſt an Enemy of Chriſtianity againſt Chriſtians them ſelves hath ſeemed doubtful: But ſurely there ſee little reaſon for ſuch an Ambiguity; for if it be la ful to make League with thoſe that are Aliens fr

the true Religion by the Law of Nature, then there can be no doubt but they may be aided. Now by the Law of Nature they may be entered into by Chriſtians with ſuch, for that Law is ſo common to all Men, that it admitteth not any Difference of Religion: Nor was the ſame univerſally forbidden by the *Hebrew* Law, as appears by *Abraham*'s aiding the wicked *Sodomites* with his Arms; and that which was very remarkable, that the *Aſmoneans*, being exceedingly ſkilful in the Law, and great Obſervers of the *Hebrew* Rites, yet made Leagues with the *Lacedæmonians* and *Romans* by the conſent of the Prieſts and People, yea and publickly offered Sacrifice for their ſafety: Nor were they forbidden by the Evangelical Law, according to that of *Tertullian* who obſerves, That ſo long as *Iſrael* was only his People, God did juſtly command mercy towards their Brethren alone; but after that, he gave unto *Chriſt the Nations for his inheritance, and the ends of the Earth for his poſſeſſion*, and that began to be paid which was promiſed in *Hoſea*, *They that were not my People ſhall be my People, and the Nations that had not obtained mercy ſhall obtain mercy*; From that time Chriſt hath extended unto all the Law of fraternal benignity, excluding none from our Compaſſion, no more than from his Vocation: From whence it follows, that the action of thoſe Captains being then in the power of the *Turk*, was lawful in the aſſiſting them againſt the *Venetians*.

[*Laus eorum in Thargum.*]

[*Vid. Carolum Molin. tract.* 2. *diſput.* 112.]

[*Lib.* 7. *c.* 3.]

[*Vide* the Caſe at large in the end of this Chapter.]

XXV. And although the Goods of Friends, according to the circumſtance of the caſe, may be preſerved by adjudication, and reſtored to their owner; yet all manner of Goods have not that priviledge: For though the *Freedom of Trade* preſerves the Goods of Friends, againſt the *rigor of War*, yet it does not *thoſe Goods that ſupply the Enemy* for War, as *Money*, *Victuals*, *Ships*, *Arms*, *and other things belonging thereto*: for to ſupply an Enemy that invades our right, or ſeeks the deſtruction of our Countries, is a liberality not to be allowed of, and it certainly ſtands with neceſſity, that *if I cannot ſafely defend myſelf or endamage my Enemy without intercepting the things ſent, it may juſtly be done*: But when ſuch goods are

[*Jus feciale.*]

[*Vide* Treaty 1 *Dec.* at *London* 1674. Art. the third, what is meant by Goods Contraband or prohibited Merchandize.]

are ſeized, whether they give the Captor a right of Property, or right by Retention, to compel that neuter Nation to give Caution for the future, by *Hoſtages* or *Pledges*, not to ſupply the Enemy, may be a queſtion. The *Romans* who had brought Victuals to the Enemies of *Carthage*, were taken by the *Carthaginians*, and again rendered upon requeſt; the *Hollanders* in the heat of the War between *Sweden* and *Poland*, never ſuffered themſelves to be interdicted with either Nation; the ſame State when they had War with *Spain*, intercepted the *French* Ships, paſſing to or from *Spain*, but reſtored them.

Cambden vide Ann. 1589. 1595.

Plutarch.

And *Pompey*, in the Hiſtory of the *Mithridatick* War, ſet a Guard on the *Boſphorus*, to obſerve if any Merchant ſailed in thither; whoſoever did, and was taken, was ſurely put to Death; ſo *Demetrius* when he poſſeſſed *Attica* with his Army, having blockt up *Athens*, hanged up both the Maſter and Commander of a Ship, who attempted to bring in Corn: The *Hollanders* having blockt up *Dunkirk*, ſome *Engliſh* Merchans Ships did attempt to enter, but were denied by the *Hollanders*.

Meurſius in his *Daniſh* Hiſt. 1 part. 2.

Moſt certain, if a *Neuter Nation* had had notice of the War, and Caution given them (as is uſual) not to ſupply the Enemy with the Counterband Goods, as they call them; if ſuch be the caſe, the prize is become abſolutely the Captor's. So Queen *Elizabeth* did, when ſhe ſeized on the 60 Sail of the *Hanſiatick Towns*, who were carrying of Goods, *ropas contrabanda*, to the *Spaniard* her Enemy; ſhe condemned them, and made them abſolute prize; *For as neuters are not compellable by the rigour of War, to give any thing againſt their Will, ſo muſt they not againſt the Will of each Party afford ſuch things as may damage one another.* For Perſons or Nations having had notice of the War, which is done, and Caution given ſometimes by *Proclamation*, or ſome other publick Edict, ſignifying the right of their Cauſe, and ſhall afterwards gather to, and aſſiſt the Enemy, whether Aſſociates, Neuters, or Subjects, the ſame yields *a right*, ſo far as to them, not only to the charge and damage that may fall thereby, by making them prize; but may make

Vide Tit. Cuſtoms.

Quæſt. 45.

Bald. ad l. 2. c. de Seven 70.

Under the Name of Con-

make them obnoxious to puniſhment: *For it is the Duty of thoſe that abſtain from War to do nothing for the ſtrengthning of him who maintains a bad Cauſe, whereby the motions of him that wageth a juſt War may be retarded*; and where the cauſe is doubtful they ought to ſhew themſelves equal to both, permitting paſſage, baking, dreſſing, and affording Proviſion for each Army or Navy.

traband may be comprehended Arms only, as pieces of Ordnance, with all Implements belonging to them, Fire-Balls, Powder, Matches, Bullets, Pikes, Swords, Lances, Spears, Halberts, Guns, Mortar-Pieces, Petards, Granadoes, Muſket-reſts, Bandaliers, Salt-petre, Muſkets, Muſket-ſhot, Helmets, Corſlets, Breaſt-plates, Coats of Mail, and the like kinds of Armature; ſo for Horſes and other Warlike Inſtruments. *Vide Marine* Treaty between *England* and *Holland*, *December* 1. 1674. *Art.* 3. *Vide* the Attempt made by *John Burrough*, to trade with the *Swede* expreſly againſt the Interdiction of the *Daniſh* King: Sir *Walter Ralegh*; *l.* 5. *c.* 1. § 10.

L. Æmilius Prætor accuſed the *Tejans* for victualling the Enemy's Navy, promiſing them Wine, adding, That unleſs they would do the like for the Navy of the *Romans*, he would account them as Enemies; but common Experience hath taught Nations and Kingdoms, when they declare Neutrality, to make Proviſion by way of League with both the Nations at War, that when it ſhould happen the Armies of both, or any draw towards their Territories, it might be lawful for them to exhibit the *Common Offices of Humanity* to both.

So likewiſe Ships Maſts, and whatſoever ſhall be thought or aſcertained capable of arming an Enemy.

Bartol. l. nullus nunc. lib. 2. *de Judeis Caelicolis*.

It happened that about ſeven ſtout Merchant-Men rode in the Port at *Smyrna*; the General of the *Venetians*, being jealous of their joining with the *Turkiſh* Armado, deſired to know their Minds, who anſwered, they would prove Neuter in the Diſpute; but afterwards (though at firſt the Captains all refuſed) upon the threatning of the *Grand Signior*, to lay an Embargo on all the Goods of the *Engliſh* Nation in his Dominion, and to make Slaves of their Perſons; thoſe Captains, were forced to join with the *Turkiſh* Forces, who beat the *Venetians* from before *Canea*, and ſo reliev'd it; the *Venetian* Ambaſſador complained to the then Powers in *England*, but could have no Relief, being anſwered, *That thoſe Ships being in the Turks Power, were ſubject to it*; the accident

Anno 1650, or 1651. *vide R. Cooke* of the church's ſtate in equal danger with the Trade.

accident being ſuch as made the Action lawful, as w
have afore remembred.

Leagues may be made with Infidels, by the Law o
Nature, and likewiſe by that of Religion, which is ſ
equally indulgent to all Men, that it will not admit o
any Difference upon the Score of Religion. *Vid.* Ex
amples and Cautions. *Grot. de jure belli & pacis lib.* 2
Cap. 15. §. 8, 9, 10, 11, 12.

CHAP

CHAP. II.

Of Letters of Marque and Reprizal.

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I. *Repriſals,*

Grot. de Jure Belli et Pacis lib. 3. c. 2. §. 4, 5.

I. Repriſals, known to us by the Word *Repriſalia*, or *Letters of Marque*, in Law have other Appellations, as *Pignoratio*, *Clarigatio*, and *Androlepſia*, &c. in Imitation of that *Androlepſia*, among the *Greeks*, to ſeize the three next Citizens of that Place, whither the Murderer had fled, and was always given to him who required revenge of the Offender; the word (*Repriſals*) is from the *French reprendre* and *Repriſe*, *i. e. reſumptio*, that is, to re-take or take again one thing for another, like our *Saxon* **Withernam**.

Repriſals are all one, both in the Common and Civil Law; *Repriſalia eſt poteſtas pignorandi contra quemlibet, de terra debitoris data creditori pro injuriis & damnis acceptis. vocabular. utriuſque Juris. 27 E. 3. Stat. 2. cap. 17. 2 Inſt. 204, 205.*

Though the Act is now become lawful by the Law (indeed *conſent*) of *Nations*, yet muſt it have its Standard-mark, for the ſame cannot be done by any private Authority, but only by the power of that Prince or Republick, whoſe Subject the injured Perſon is; nor is the ſame grantable by Authority, but where the Party injured has *Juſtice denied him*, or the ſame *illegally delayed*.

II. By the *Law of Nature* no Man is bound for another's Act, but only the Succeſſor of his Eſtate, for that Goods and Eſtate ſhould paſs with their *Burthens*, was introduced together with the *Dominion* of Things; hence it is that the Son cannot be moleſted for the debt of his Father, * neither the Wife for the debt of the Husband, nor the Huſband for the debt of the Wife; the ſame being againſt natural equity, that one ſhould be troubled for the debt of another.

** Leg. unica, c. ut null. ex vicanis c. ne uxor pro mar. & ne fil. pro patre. totis tit.*

Ulpian. Leg. ſicut ſect. quod cuique univerſ. nom Et ſinguli debebunt non tanquam proprium ſed tanquam publicam publici partem. Seneca, lib. 6. de Beneſic. c. 20. & cap. 19.

So it is, that no particular Men owe, or are obliged for the debt which the *Community* owes, that is, if the *Community* have any Goods; but if Money be lent to a *Community*, each Particular is naturally bound, as they are a part of the whole, if the Stock publick be wanting. If one lends my Country Money (ſays *Seneca*,) *I will not call myſelf his Debtor, yet will I pay my Share.* And again, *Being one of the People, I will not pay as for myſelf, but contribute as for my Country.* Naturally, nay, by the very *Roman Law*, * one Village was not bound for the other, nor one Man's Poſſeſſions charged for another; no not ſo much

** Leg. nullam,*

much as with the Debts publick; the reaſon being added, *That it was againſt reaſon for one to be charged with the debt of another.* c. de Execut. & Exactionibus.

III. And though by the *Law of Nature* one Man's Goods are not tied for the debts of another, no nor for thoſe of the *Publick*; yet by the voluntary Law of Nations, the ſame might be introduced and brought in, and the ſame may ſtand well with the *Laws of Nature*; for that might be introduced by Cuſtom and tacit Conſent, when even Sureties without any Cauſe, may ſubject and make liable their Goods and Eſtates for the Debts of a Stranger. So likewiſe that for any Debt, which any *Civil Society*, or the *Head* thereof ought to make good, or becauſe the *Sovereign* or *Head* hath not done right in another's Debt, but hath made himſelf liable to render Satisfaction; ſuch a *Society* may oblige and make liable all their Goods corporeal or incorporeal, for the Reddition of Satisfaction. Hence it was, as the great *Juſtinian* obſerves, That this Cuſtom was conſtituted by the *Nations*, grounded on the Urgency of human Needs, aſſerted with the greateſt of Neceſſities: Since without this, great Licence would be given and tolerated for the committing of Depredations and Injuries; eſpecially if only the Goods of Rulers were made liable, who ſeldom poſſeſs any thing, that, for Satisfaction, the injured may eaſily come by; whereas thoſe private Men, whoſe Commerces are various, may be catcht for recompence, ſometimes with the greateſt eaſe, and freeſt from Danger. Beſides, the Owners of ſuch Prize being Members of the ſame *Society*, might more eaſily obtain mutual right for ſatisfaction of the injur'd, and their own future indemnity than Foreigners could, who without ſuch a Tye would be very little regarded. *In Nov. Juſt. 52. 134. c. unico de injuriis in ſexto. Juſt. Inſt. de Jure Nat.* *Baldus 3. conſ. 58. Bartol. de repreſſ. q. 5. ad ter. num. 9.*

IV. Beſides, the Benefit of this Obligation was common to all Nations, ſo that they which were one Time grieved with it, another time might be eaſed by the ſame. Moreover that this Cuſtom was received, appears not only out of full Wars which Nations wage againſt Nations (for in theſe what is obſerved may be ſeen in the Forms of the ancient Denunciations. *Populis priſcorum Latinorum, hominibuſque, priſcis Latinis bellum* Liv. lib. 1.

indico

Lib. 31. *indico facioque.* So likewiſe in the Propoſal: *Vellent, juberent Philippo Regi, Macedonibuſque qui ſub regno ejus eſſent, bellum indici.* And in the very Decree or Proclamation itſelf: *Populus Romanus cum populo Hermundulo hominibuſque Hermundulis bellum juſſit*) but alſo where Wars are not come to that fulneſs of War, yet there is need of a certain violent Execution of Right, that is imperfect War. *Ageſilaus* of old ſaid to *Pharnabazus*, a Subject to the King of *Perſia*: *We,* O Pharnabazus, *when we were the King's Friends, carried ourſelves like Friends towards all his, and being now become his Enemies, we carry ourſelves like Enemies; wherefore ſeeing you will be one of the things that are his, we do juſtly oppoſe him in you.* A ſpecies of this ſort of Execution by Reprizal was that which the *Athenians* called apprehenſion of Men, of which the Attick Law (as Mr *Rous* obſerves) *If one have force offer'd him and die, his Kinſmen and Friends may apprehend Men, till either the Manſlayer be duly puniſhed or yielded; but it is lawful to apprehend three Men and no more.* By which it plainly appears, that for the debt of the City, which is bound to puniſh her Subjects that have hurt others, is tied a certain incorporeal right of the Subjects, that is, the liberty of taking whom they pleaſe, and doing what they will: So that ſuch Perſons ſo taken, by that Law might be made Slaves until the City did that which by Law ſhe was obliged to perform. In like manner to recover a Citizen taken Captive by manifeſt Injury, are the Citizens of that City, where the Injury was done, retained by Reprize, Wherefore at *Carthage* they would not ſuffer *Ariſton* the *Tyrian* to be taken; for, ſaid they, *the ſame will befal the* Carthaginians *at* Tyre, *and in other Towns of Trade, whereto they often reſort.*

Gellius lib. 16. cap. 4.

Plutarch Ageſil.

Archaeologia Attica.

Herod, to whom it was not lawful to make War againſt the *Arabians*, might lawfully uſe pignoration.

Joſeph. lib. 6.

Liv. lib. 34.

V. A due Adminiſtration of Juſtice is not the leaſt ſenſe, wherein Princes are ſtiled Gods: To deny or delay Juſtice is Injuſtice; Juſtice is every Man's right who hath not forfeited what he might claim by the *Jus Gentium.*

If therefore the Party cannot obtain his Definitive *Sentence* or *Judgment*, within a fit time againſt the Perſon of whom he complains, or if there be a Judgment given againſt *apparent Right* and Law; yet if no Relief can

C. Si ſententia c. 16. de Sent. excom. in 6 conſtit. Leg. qui reſtituere de rei vindic.

can be had, the Bodies and Moveables of his Subjects, who renders not right, may be taken.

VI. In the Proſecution of which there muſt be,

1. The Oath of the Party injured, or other ſufficient Proof, touching the pretended Injury, and of the certain Loſs and Damage thereby ſuſtained.
2. A Proof of the due Proſecution for the obtaining of Satisfaction in a legal way.
3. Protelation or denial of Juſtice.
4. A Complaint to his own Prince or State.
5. Requiſition of Juſtice by him or them, made to the Supreme Head or State, where Juſtice in the ordinary courſe was denied.
6. Perſiſtency ſtill, in the denial of Juſtice.

All which being done, Letters of Reprizal under ſuch cautions, reſtrictions, and limitations as are conſonant to Law, and as the ſpecial caſe may require, may iſſue not only by the *Jus Gentium* and *Civile*, but by the antient and municipal Laws of the Kingdom *.

* *Magna Charta C.* 30. the latter Clauſe.

Clauſ. 7. *Johan. Reg. m.* 22. *Pat.* 15. *E.* 3. *part.* 2. *dorſ.* 48. *Pat.* 23. *H.* 6. *part.* 2. *dorſ.* 14, 15.

VII. The *Reprizals* grantable by the Laws of *England*, are of two ſorts, *Ordinary* and *Extraordinary*. The *Ordinary* are either within the Realm or without, and are always granted where any *Engliſh* Merchants or their Goods are ſpoiled, or taken from them, in parts beyond the Sea by Merchants Strangers, and cannot upon Suit, or the King's demanding of Juſtice for him, obtain the ſame, he ſhall have upon Teſtimony of ſuch proſecution, a Writ out of the *Chancery*, to arreſt the Merchants Strangers of that Nation their Goods here in *England*; the which is grantable to the Subject oppreſſed of *Common Right*, by the *Chancellor* or *Keeper* of *England*, who always in ſuch caſe hath the approbation of the King or Council, or both, for his ſo doing; the other, which is for ſatisfaction out of the Realm, is always under the Great Seal.

Fitz. H. N. Bre. 114. *Reg.* 129. *Pat. Rolls* 14. 14 *H.* 6. *par.* 1. *dorſ.* 15. 17. 22. & *M.* 5. 6. 7. *par.* 2. *dorſ.* 18. 22 *E.* 4. *par.* 2. *M.* 25. *dorſ.* 2. & 4 *Inſt.* 124. 125. 137. *Lex. Mercat.* 120. 1 *Hale's Hiſt. Pl. Cr p.* 162.

They are either, 1. Particular to particular Perſons upon particular Occaſions; or, 2. General, which hath in a great Degree the Effect of a War, though it is not a regular War. *See* for more Matter the Place cited; or above, *Chap.* 1. *Sect.* 6.

VIII. But

VIII. But Letters of Reprizal granted in the *Ordinary* way for reparation out of the Realm, which are always under the Great Seal of *England*, cannot be revoked, (though perhaps in point of State there may be a ſuſpending the Execution of them for reaſon grounded on the publick good) and the reaſon wherefore they cannot be annulled or revoked is, becauſe after the Perſon injured

Leg. qui reſtituere de rei vindic.

hath petitioned, and hath according to Law made out by proof his loſs, and Letters of Requeſt have gone, and no reparation made, then the Letters Patents of Reprizal being ſealed, the ſame does immediately create and veſt a National Debt in the Grantee to be ſatisfied in ſuch manner and by ſuch means as the ſame Letters Patents do direct out of the Goods and Eſtates of his Subjects, who

Vide Treaty 1666. *Breda Art.* 5.

refuſes or protelates to do right (however as the King hath the Legiſlative power of Peace and War in a publick Treaty for the Nation's good, they may be mortified, and then revoked by the great Seal in purſuance of that Treaty).

Nor do I ſee it an act unjuſt internal to deny the Execution of ſuch Letters Patents, according to that of St *Paul*, *All things are lawful for me*, *but all things are not expedient.* Now to the true Interpretation of the word *lawful* ſtrictly, it is to do a thing without violating the Rules of Piety and Charity. Now there are many things amongſt men which are not internally juſt, and cannot be done without violating the Laws of Charity, yet are

Quintilian.

lawful to be done, as in the Law of the *XII. Tables*, *the Creditors might divide the Debtor's Body amongſt them.* So in acquiring ſatisfaction for Damages, the Lives and Goods of Innocents may be involved in Death and Deſtruction, whoſe peaceable Tract in Commerce never gave them knowledge of this *privatum Bellum*, nor were they Actors in the Injury original. 'Tis true ex-

Omnia dat qui juſta negat.

Orat. pro Balbo.

ternally, according to that of *Lucan*, *That Prince or State that denies me right*, *gives me all.* But the incomparable *Cicero* obſerves, *That there are ſome Offices to be done to them from whom you have receiv'd an Injury*, *for revenge and puniſhment muſt have a meaſure.* Now if the ſupreme Power does think that the Execution of ſuch Letters of Reprizal cannot well be effected without endangering the Peace of both Eſtates, there may be a juſt cauſe to reſpite

pite the Execution till a time more convenient may occur, for that the Lives and Eſtates of thouſands may be involved in the repairing of one Injury, private and peculiar: Nor do I ſee the ſame to appear repugnant to the Laws poſitive that have been made for the awarding thoſe Commiſſions. 'Tis very true the † Statute reciting, "That at the grievous Complaints of the "Commons of *England*, who had ſuffered many Wrongs "and Injuries in the Loſs of their Ships and Goods upon "the main Sea againſt Leagues, ſafe-Conducts, and Truces which were broken by the Subjects of other Nations, the ſame Parliament reciting their willingneſs "to provide Remedy and Relief for the grieved by "ſpoil and injuries done unto them beyond the Seas, upon Complaint to the Keeper of the Privy-Seal (on full "evidence ſhewn) he ſhall ſign Letters of Requeſt to "demand reſtitution and reparation to the Parties "grieved: Which if not made in convenient time, then "the Lord Chancellor of *England* ſhall grant Letters of "Reprizal in due Form of Law for the Indempnity of "the Perſons intereſted and injured." Yet this does in no reſpect reſtrain the King's Prerogative and Authority, which he had at the Common Law in the judging the conveniency and time, when to be executed. Nor does the ſubſequent Statute †, reciting: "Whereas divers great offences were often committed againſt "Leagues, Truces, and Amities between the King "and other Princes or States, againſt ſafe-Conducts and Licences, and againſt the Laws and "Statutes of the Realm (in that caſe made and "provided) to the great ſlander of our Soveraign "Lord the King, and the Damages of the good "Subjects the Commons of England. It was "therefore Ordained, Eſtabliſhed, Enacted, and "Confirmed by the Conſent of the Lords Spiritual "and Temporal, and Commons aſſembled in Parliament, That all Statutes and Ordinances "againſt the Offenders of Leagues, Truces, ſafe-Conducts, and Amities ſhall be in full force, excepting the Clauſe in the Act which made it High "Treaſon in the Second Year of Hen. 5. Therefore it is plain there were Statutes made for the more effectual

Eſt enim aliquid quod non oportet, etiam ſi licet. Idem pro Milone.

† 4 *Hen.* 5. *c.* 7.

† 14 *Ed.* 4. *c.* 4.

fectual providing for the Subject, and Letters of Reprizals, they being granted long † before the Statutes, and the King's Prerogative not the leaſt diminiſhed, but remaining at the Common Law to judge when expedient.

† *Johan. Reg. memb. 22. Pat. 15. Ed. 3. part. 2. dorſ. 48*

IX. And ſince the granting of Letters of Reprizal does not, in the ordinary way for particular ſatisfaction, amount to a breach of the Peace, I have thought fit for the excellency and care that is had in the compoſing and framing of them, to recommend one that was granted upon Solemn Advice, and for the Reaſons therein mentioned.

Vide §. 15. *poſtea.*

X. The *Extraordinary* are by Letters of *Marque*, for reparation at Sea, or any place out of the Realm, grantable by the *Secretaries* of State, with the like approbation, of the King or Council, or both; but they are only during the King's Pleaſure, and to weaken the Enemy during the time of War, and may at any time be revoked.

XI. As Princes by the Laws of *Nations* are reſponſible for injuries *publick*, ſo ſhould they by the moſt prudent ways imaginable prevent thoſe that are *private*, not ſuffering Foreigners, if poſſible, to receive wrongs in their Countries: For, as the *Florentine* obſerves, *If a Man be exceedingly offended, either by the publick, or by any other private hand, in a Foreign Nation, and cannot obtain reparation according to Juſtice, he will never leave blowing the Coals, or ceaſe promoting the injury, till the flame break out into War; in which he cares not if he ſee the ruin of that Kingdom or State, where he receiv'd his wrongs.*

Machiavel on his *Tit. Liv. C.* A Prince in this latter Age loſt his Country but for a Load of Sheep-Skins: *Philip Comines in vita Caroli Ducis Burgund.*

Nor ſhould the Prince or State of the Perſon injured, value his Misfortune at ſo low a Rate, as to deny him Letters of Requeſt, for that were to heap up injury upon injury; but likewiſe, if Juſtice be denied after ſuch requeſt, to arm him with power to take ſatisfaction by repriſe, *vi, manu & militari.*

Leg. qui reſtituere de rei vindicat.

Generally there always proceed Letters of Requeſt, two or three, more or leſs; and according to the ſatisfaction, ſufficient or inſufficient, returned in anſwer to the ſame, Commiſſions are awarded.

XII. *Subjects* cannot by force hinder the Execution even of an unjuſt Judgment, or lawfully purſue their right by

Res judic. pro veritate habetur; yet it is

by force, by reaſon of the efficacy of the power over them: But *Foreigners* have a right to compel, which yet they cannot uſe lawfully, ſo long as they may obtain ſatisfaction by Judgment. But if that ceaſes, then Reprizal is let in.

as true, *Judex male judicans pro injuria tenetur.*

XIII. Now Judgment is obtained either in the *Ordinary* Courſe, by way of *Proſecution*, or *Suit*, or *Appeal* from the ſame, after Sentence, or Judgment given, to a higher Court; or elſe in the *Extraordinary* way, which is by way of Supplication, or Petition to the *Supreme Power*; but we muſt underſtand that to be, when the matter *in controverſy* is, *tam quoad merita quam quoad modum procedendi*; not doubtful, for in doubtful matters the preſumption is ever for the Judge or Court.

But the Reprizal muſt be grounded on wrong Judgment given in matters *not doubtful*, which might have been redreſſed one way or other; either by the ordinary or extraordinary power of the Country or Place; and the which was apparently *perverted* or *denied*.

Et cum per injuriam Judicis domino rem quæ debitoris non fuiſſet, abſtuliſſet creditor, quaſi obligatum ſibi; & quæritur an ſoluto debitori reſtitui eam oporteret; debitori Scævola reſtituendam probavit, Leg. ſcripturam ff. de diſtr. pign.

But if the matter be doubtful, then otherwiſe; for in Cauſes dubious or difficult, there is a preſumption always that Juſtice was truly Adminiſtred by them who were duly Elected to publick Judgments.

XIV. And yet in this latter Caſe, ſome * are of Opinion, that if the Caſe were dubious, and if the Judgment were againſt apparent Right, the Stranger oppreſſed is let into his ſatisfaction; and the reaſon is, becauſe the Judge's Authority is not the ſame over *Foreigners*, as over *Subjects*, for the reaſon above-mentioned.

* *Verus debitor, licet abſolutus ſit natura tamen debitor permanet. Paulus Leg. Julia D. de cond. indebitor.*

If an *Engliſh* Merchant ſhall proſecute a Suit in the Ordinary Courts of the Law beyond Seas, and Sentence or Judgment ſhall paſs againſt him, from which he appeals to the *Supreme Judgment*, and there the firſt Judgment or Sentence is affirmed, though the Complainant hath received a Judgment againſt the *real Right* of the Cauſe, yet this will be no cauſe for Letters of Reprizal, though perhaps it may occaſion Letters of *Requeſt* (if there be ſtrong circumſtances for the ſame) to have a rehearing of the Cauſe.

But if an *Engliſh* Man ſhall recover a Debt there, and then the Officer having the Debtor in Cuſtody, will wil-

C fully

fully let the Priſoner eſcape, and then become inſolvent, the ſame may perhaps occaſion Reprizal.

Nulli vendemus, nulli negabimus, aut deferemus juſtitiam, Grand Charter *Coke* 2 *Inſt.* 56.

In *England*, If a Foreigner bring an Action Perſonal againſt *I. S.* and the matter is found *ſpecial* or *general*, and the Party prays Judgment, and the Court refuſes it; and then the Defendant dies, and with him the Action, (the nature of it being ſuch) the Party is here without Remedy, the ſame may occaſion Letters of Reprizal, if it be accompanied with thoſe Circumſtances that evince an apparent denial of Juſtice, *i. e.* as putting it off from *Term* to *Term* without cauſe.

An *Engliſh* Man purſues his Right in the legal Courts beyond Seas, and the Military Governor oppoſes the proſecution, and by force conveys away the Debtor and his Goods, the Sentence or Judgment is obtained: its ultimate end being *Execution*, being thus fruſtrated, may occaſion Letters of Reprizal.

Caſe of Slaughter, *Lee* againſt the Governor of *Legborn*, upon the Petition of *Gould* and *Canham* merchants, in *Nov.* 1670. on which two Letters of Requeſt were ſent to the great Duke of *Tuſcany*, for redreſs.

XV. Perſons murder'd, ſpoil'd, or otherwiſe damnified in hoſtile manner, in the Territories or places belonging to that King, to whom Letters of Requeſt are iſſued forth, if no ſatisfaction be returned, Letters of Reprizal may iſſue forth; and the Parties Petitioners are not in ſuch caſes compelled to reſort to the Ordinary proſecution: But the Prince of that Country, againſt whom the ſame are awarded, muſt repair the damage out of his or their Eſtates, who committed the injuries; and if that proves deficient, it muſt then fall as a common Debt on his Country.

Such Letters of Requeſt generally allot a time † certain for Damages to be repair'd, if not, Reprizals to iſſue forth: A ſingular Example of which you will find hereunder.

† After the Maſſacre at *Amboyna*, and the other depredations committed by the *Flemings* on the *Engliſh*, his Majeſty in 1625, iſſued forth his Letters of Requeſt to the States of *Holland*; for Satisfaction within 18 Months, otherwiſe Letters of Reprizal. *Vide* Journals of that Year, and *Leo Aitzma*, *p.* 48. 13. 41. 82. So likewiſe Letters of Requeſt went to the King of *Spain*, requiring Satisfaction for the depredation committed on the Ship and Goods of Mr. *Stampe*, who was ſpoiled and murdered at the *Havanna*, *Anno* 1674. *Vide* the Proclamation 1675. of Reward promiſed by his Majeſty for the apprehending the Offenders dead or alive.

A Copy of Letters Patents, for eſpecial Repri-

CHARLES the Second, by the Grace of God, of England, Scotland, France, and Ireland, King, Defender of the Faith, *&c.* To all Chriſtian People, to whom

zals from the King of *Great Britain.* (under the Great Seal of *England*) againſt the States-General and their Subjects, inrolled in the High Court of Chancery, 19 *Maii*, 15. *Car.* 2.

whom theſe Preſents ſhall come, GREETING: WHEREAS our loving Subject William Courten, Eſq; deceaſed, and his Partners Anno 1643. by the depredation and hoſtile act of one Gailand, Commander in chief of Two Ships belonging to the Eaſt-India Company of the Netherlands, was between Goa and Maccao in the Straights of Malacca, deprived and moſt injuriouſly ſpoiled of a certain Ship named the Bona Eſperanza, and of her Tackling, Apparel, and Furniture, and all the Goods and Lading in her, upon a very hopeful trading Voyage to China, which were carried to Batavia, and there all de facto without due Proceſs of Law confiſcated. And that alſo in the ſame Year another laden Ship of Our ſaid Subject, called the Henry Bonadventure, being come on Ground near the Iſland Mauritius, was there both Ship and Goods ſeized upon by ſome of the Officers and Miniſters, and others under the Command of the ſaid Eaſt-India Company, and utterly detained from the right Owners. AND WHEREAS the ſaid William Courten, and his Aſſigns in his Life-time, uſed all poſſible endeavours to recover the ſaid Ships and Goods, and to procure further Juſtice againſt the Malefactors, and yet could obtain no Reſtitution or Satiſfaction, whereby they became much to be diſtreſſed and utterly undone in their Eſtate and Credit: And that thereupon, and upon the moſt humble Supplications and Addreſſes of Francis Earl of Shrewſbury, and William Courten, Eſq; Grand-Child and Heir of the ſaid Sir William deceaſed, Sir John Ayton and Sir Edmond Turner Knights, George Carew and Charles Whitaker Eſquires, on the behalf of themſelves and divers others intereſted in the ſaid two Ships Bona Eſperanza, and Henry Bonadventure, and in the Eſtates of the ſaid Sir William Courten deceaſed, Sir Edward Littleton Baronet, and Sir Paul Pindar Knight deceaſed, that We would take their Caſe into Our Princely conſideration. WE OUT OF A JUST SENSE We then had and ſtill have of their unjuſt SUFFERINGS in that buſineſs; both by Our own Letters under OUR SIGN Manual to the States-General of the United Provinces, and by Sir

George Downing Knight and Baronet, Our Envoy Extraordinary, to whom We gave Eſpecial Command ſo to do, required ſatiſfaction to be made according to the Rules of Juſtice, and the Amity and good correſpondence, which We then deſired to conſerve with them firm and inviolable. AND WHEREAS after ſeveral Addreſſes made to the ſaid States-General by our ſaid Envoy, and nothing granted effectual for Relief of Our ſaid Subjects, (whom we take Ourſelves in Honour and Juſtice concerned to ſee ſatiſfied and repaid) We lately commanded the ſaid Sir George Downing to intimate and ſignify to the ſaid States, that we expected their final Anſwer, concerning ſatiſfaction to be made for the ſaid Ships and Goods by a time then prefixed and ſince elapſed, that We might ſo govern Our ſelves thereupon, that Our aforeſaid Subjects might be relieved according to Right and Juſtice; and yet no ſatiſfactory Anſwer hath been given, ſo that We cannot but apprehend it to be, not only a fruitleſs Endeavour, but a proſtituting of Our Honour and Dignity, to make further Application after ſo many denials and ſlightings. AND WHEREAS John Exton, Doctor of Laws, Judge of our High Admiralty Court of England, upon our Command, to certify to Us the Value of the Loſſes and Damages ſuſtained by the ſaid William Courten and Partners, whoſe Intereſt is now veſted in our loving Subjects, Sir Edmond Turner Knight, and George Carew, Eſq; and Partners, hath upon full Examination and Proofs thereof made by Witneſſes in Our High Court of Admiralty, reported and certified under his Hand, that the ſame do amount to the Sum of One Hundred fifty one Thouſand ſix Hundred and twelve Pounds.

NOW KNOW YE, That for a full reſtitution to be made to them for their Ships, Goods and Merchandizes, of which the ſaid William Courten and the Aſſigns of the ſaid William Courten and Partners, were ſo deſpoiled as aforeſaid, with all ſuch Coſts and Charges, as they ſhall be at for the recovery of the ſame, We by the Advice of Our Privy Council have thought fit, and by theſe Preſents

ſents do grant Licence and Authority under Our Great Seal of England, unto our ſaid Subjects Sir Edmond Turner and George Carew, their Executors, Adminiſtrators and Aſſigns, for and on the behalf of themſelves, and other perſons intereſſed as aforeſaid, to equip, victual, furniſh, and to ſet to Sea from time to time, ſuch and ſo many Ships and Pinaces as they ſhall think fit. PROVIDED, always that there be an Entry made and recorded in the Admiralty Court of the Names of all Ships and Veſſels, and of their Burden and Ammunition, and for how long time they are victualled: And alſo of the Name of the Commander thereof, before the ſame or any of them be ſet forth to Sea; And with the ſaid Ships and Pinaces by force of Arms to ſet upon, take and apprehend any of the Ships, Goods, Monies and Merchandizes of the States General, or any of the Subjects inhabiting within any their Dominions or Territories, whereſoever the ſame ſhall be found, and not in any Port or Harbour in England, or Ireland, unleſs it be the Ships and Goods of the Parties that did the Wrong. And the ſaid Ships and Goods, Monies and Merchandizes, being ſo taken and brought into ſome Port of Our Realms and Dominions, an Inventory thereof ſhall be taken by Authority of Our Court of Admiralty by the Judge or Judges thereof, for the time being, upon Proof, made before him or them, that the ſaid Ships, Goods, Wares, Merchandizes or Money, did belong to the States General, or any of the Subjects as aforeſaid. That they ſhall be lawful Prize to the ſaid Sir Edmond Turner and George Carew, their Executors, Adminiſtrators and Aſſigns as aforeſaid, to retain and keep in their or any of their Poſſeſſions, and to make ſale, and diſpoſe thereof in open Market or howſoever elſe, to their and every of their beſt Advantage and Benefit, in as ample manner as at any time heretofore hath been accuſtomed by way of Reprizal, and to have and enjoy the ſame as lawful Prize, and as their own proper Goods: SO THAT "NEITHER Captain, " Maſter, nor any of the Company, that ſhall ſerve " in his own perſon, or ſhall promote and advance

“ the ſaid enterprize in manner and form aforeſaid,
“ ſhall in any manner of wiſe be reputed or chal-
“ lenged for any Offender againſt any of our Laws.
“ And that alſo it ſhall be lawful for all manner of
“ perſons as well our Subjects, as any other, to
“ buy the ſaid Ships, Goods, and Merchandizes
“ ſo taken and apprehended by the ſaid Captains,
“ Maſters and others, and adjudged as aforeſaid,
“ without any Damage, Loſs, Hindrance, Trou-
“ ble, or moleſtation, or incumbrance, to befal the
“ ſaid Buyers, or any of them, in as ample and law-
“ ful manner, as if the Ships, Goods, Wares, and
“ Merchandize, had been come and gotten by the
“ lawful Traffick of Merchants, or of juſt Prizes
“ in the Time of open War. PROVIDED al-
ways, that all Ships, Goods, and Merchandize,
taken by virtue of this Our Commiſſion ſhall be
kept in ſafety, and no part of them waſted, ſpoiled
or diminiſhed, or the Bulk thereof broken, until
Judgment have firſt paſt as aforeſaid, that they
are the Ships and Merchandizes of the States Ge-
neral, or ſome of their Subjects as aforeſaid. And
if by colour of this our Commiſſion, there ſhall be
taken any Ships, Goods, or Merchandizes of any
of our loving Subjects, or the Subjects of any
Prince, or State in good League, or Amity with
Us (except the States General) or their Subjects as
aforeſaid, and the Goods therein laden, ſold and em-
bezzeled, or diminiſhed, or the Bulk thereof broken
in any place before they ſhall be adjudged to be-
long to the States General, or ſome of their Subjects
as aforeſaid, that then this Commiſſion ſhall be of
no ſufficient Authority, to take the ſaid Ships,
Goods and Merchandizes, or to warrant, or ſave
harmleſs ſuch as ſhall receive, buy or intermeddle
therein; but that both the prizes ſo taken, and the
ſaid Ship of War, ſhall be confiſcated to our Uſe.
“ AND FURTHER, We do hereby declare,
“ that it is our Will and Pleaſure, that this Our
“ Commiſſion ſhall remain in full force and power,
“ to all intents and purpoſes, until the ſaid Sir
“ Edmond Turner, and George Carew, their Execu-
“ tors, Adminiſtrators, and Aſſigns, as aforeſaid,

“ ſhall

“ ſhall by virtue thereof have by force of Arms ap-
“ prehended, taken, ſeized, recover'd, and received
“ from the ſaid States General, or their Subjects, one
“ hundred fifty one thouſand ſix hundred and twelve
“ Pounds, according to the Appraiſement to be
“ made by ſufficient Appraiſers, upon Oath nomi-
“ nated and authorized in Our ſaid Court of Ad-
“ miralty, of all ſuch Ships, Goods, Wares, and
“ Merchandizes, as ſhall be taken from the ſaid
“ States General, or any of their Subjects, by vir-
“ tue of this Commiſſion, or ſhall otherways re-
“ ceive ſatisfaction of the Debt aforeſaid, by Com-
“ poſition to be made between thoſe of the Eaſt
“ India Company of the Netherlands, and the ſaid
“ Sir Edmond Turner, and George Carew, their
“ Executors, Adminiſtrators and Aſſigns, as afore-
“ ſaid. NOTWITHSTANDING it ſo happen, the
“ preſent Difference between Us, and the States-
“ General, depending upon general Repriſals, may
“ be agreed and compoſed, and that in the Inte-
“ rim a Peace and good Correſpondence may be
“ renewed between Us and the ſaid States General:
“ In which Caſe neverthelefs, It is Our Will and
“ Pleaſure that in the Execution of this Our Com-
“ miſſion, no Violence ſhall be done to the Perſons
“ of the ſaid Subjects of the ſaid States General,
“ but only in Caſe of Reſiſtance, and that after
“ in cold Blood, the Subjects of the ſaid States
“ General, if hurt or wounded, ſhall be uſed with
“ all convenient office of humanity and kindneſs.
“ AND FURTHER, Our Will and Pleaſure is,
“ That although it ſhall happen that all Hoſtili-
“ ty between Us and the States General, and Our
“ reſpective Subjects ſhall ceaſe, yet this Our Com-
“ miſſion ſhall remain, and be in full Force and
“ Power, to the ſaid Sir Edmond Turner, and George
“ Carew, their Executors, Adminiſtrators, and Aſ-
“ ſigns, as aforeſaid, by virtue thereof to appre-
“ hend, take and ſeize, by Force and Arms, ſo
“ many more of the ſaid Ships and Goods of the
“ States-General, or any of their ſaid Subjects, as
“ beſides the ſaid Sum before-mentioned ſhall coun-
“ tervail, ſatisfy, and pay all ſuch Coſts and

“ Charges as the ſaid Sir Edmond Turner, and
“ George Carew, their Executors, Adminiſtrators,
“ or Aſſigns, as aforeſaid, ſhall from time to time
“ make Proof to have diſburſed, and paid towards
“ the equipping, manning, paying, furniſhing, and
“ victualling of the ſaid Ships, ſo licenſed and au-
“ thorized as aforeſaid, by this our ſaid Commiſ-
“ ſion to be equipped, manned, furniſhed, and vic-
“ tualled, by the ſaid Sir Edmond Turner, and George
“ Carew, their Executors, Adminiſtrators, and Aſ-
“ ſigns as aforeſaid, for the purpoſe aforeſaid.

AND OUR WILL and Pleaſure is, and we do hereby require Our Judge or Judges of Our high Court of Admiralty, for the Time being, and all other Officers of the Admiralty, and all other our Judge or Judges, Officers, Miniſters, and Subjects whatſoever, to be aiding and aſſiſting to the ſaid Sir Edmond Turner, and George Carew, their executors, Adminiſtrators, and Aſſigns as aforeſaid, in all Points in the due Execution of this Our Royal Commiſſion, and to proceed to Adjudications, and adjudge all Ships, Merchandizes, Monies and Goods by Virtue thereof to be taken, according to our princely Intention, hereby ſignified and expreſſed, and to take Care that this Our Royal Commiſſion to be duly executed, and favourably interpreted and conſtrued in all reſpects, to the Benefit and beſt Advantage of the ſaid Sir Edmond Turner and George Carew, their Executors, Adminiſtrators, and Aſſigns, as aforeſaid. IN WITNESS whereof, We have caſed theſe Our Letters to be made Patents. Witneſs Ourſelf at Weſtminſter, the 19th Day of May, in the Seventeenth Year of Our Reign.

BY THE KING.

XVI. It is not the place of any Man's *Nativity*, but his *Domicil*; not of his *Origination* but of his *Habitation*, that ſubjects him to *Reprize*: The Law doth not conſider ſo much where he was born, as where he lives; not ſo much where he came into the World, as where he improves the World.

If

If therefore Letters of Reprizal ſhould be awarded againſt the Subjects of the *Duke of Florence*, and a Native of *Florence*, (but denizened or naturalized in *England*) ſhould have a Ship in a Voyage for *Legborn*, if a Caption ſhould be made, the ſame is not lawful, nor can the ſame be made Prize. Yet by the Laws of *England*, a natural born Subject cannot diveſt himſelf of his Allegiance; tho' he happens to be commorant in the Enemy's Country.

XVII. It doth not any where appear, that *Reprizals* can be granted on Misfortunes happening to Perſons or their Goods, reſiding or being in Foreign parts in time of War there; for if any Misfortune happens, or is occaſioned to their Effects, or to their Perſons, then they muſt be contented to ſit down under the Loſs; it being their own fault, they would not fly or relinquiſh the place, when they foreſaw the Country was ſubject to the ſpoil of the Soldiers, and devaſtation of the Conqueror.

The Factions of the *Guelfs* and *Gibellins* in *Florence*, warring againſt each other, The *Guelfs* obtaining the Victory, and thruſting the *Gibellins* out of it, after they had taken the City, *Domum cujuſdam Hugonis de Papi in hoc Regno Angliæ demorantis diruerunt*, and plundered his Goods therein, *qui Hugo ſupplicavit Domino Regi, ut Inde Itali Mercatores* (of that Faction and City then in *England*) *emendas hic ſibi facerent*; upon which *adjudicatum fuit, quod dicti Mercatores dicto Hugoni ſatisfaciant pro damnis ſuſceptis, & deſtructione domus ſuæ:* upon which a Writ of Error was brought, and the Judgment was reverſed in theſe words; *Quòd non eſt conſuetudo Angliæ de aliqua transgreſſione facta in aliena Regione, tempore Guerræ, vel alio modo —— conſideratum eſt, quod totus proceſſus & ejus effectus revocentur*, &c.

Mich. 5. E. 1. Rot. 53. (in Theſaur. Recept. Regis in Scac.) coram Rege Florentiæ.

Vide Rot Vaſconiæ 28 E. 3. Rot. 7. pro Rob. Draper & aliis Civibus Corke in Hibernia.

XVIII. By right (for ſo it is now called of rendring like for like) there are many perſons exempted, and thoſe whoſe Perſons are ſo privileged, have alſo protection for their Goods, ſome by the *Laws of Nations*, ſome by the *Civil Law*, others by the *Common Law*; among which *Ambaſſadors* by the Laws of Nations, their Retinue and Goods are exempt, coming from him who awarded the Reprize, the Laws of Nations not only provided for the Dignity of him that ſends, but likewiſe the ſecure going and coming of him that is ſent.

Rex fâciſſe tu Regium Nuntium Populi Romani Quirit. vaſa comiteſque meos.

The Ambaſſadors of the *Romans* being ill uſed by the *Carthaginians*, and *Scipio*'s Army

Nor

having ſurprized the Ambaſſadors of the *Carthaginians*, was demanded what ſhould be done to them, anſwered, not as the *Carthaginians* have done to the *Romans*.

Nor againſt thoſe that travel for Religion, nor on Students, Scholars, or their Books; nor on Women or Children by the *Civil Law*: nor thoſe that travel through a Country, ſtaying but a little while there; for they are only ſubject to the Law of the place.

By the *Canon Law* Eccleſiaſtical Perſons are expreſsly exempt from Reprizals.

A Merchant of another place than that againſt which *Reprizals* are granted, albeit the Factor of ſuch Goods were of that place, is not ſubject to Reprizals.

XIX. Ships driven into Port by ſtorm or ſtreſs of weather, have an exemption from the Law of Reprizals, according to the *Jus Commune*, but by the Law of *England* otherwiſe, unleſs expreſsly provided for in the Writ, or Commiſſion.

But if ſuch Ship flies from his own Country to avoid Confiſcation, or ſome other Fault, and is driven in by ſtreſs of Weather, ſhe may then become ſubject to be prize.

But it is not lawful to make ſeizure in any Ports, but in his who awarded the Reprizal, or his againſt whom the ſame iſſued; for the Ports of other Princes or States the *Peace of them* are to be maintained.

XX. Ships attacked by thoſe that have Letters of Reprize, and refuſed to be yielded up, may be aſſaulted and entred; and though it may fall out, not by intention, but by accident, that ſome of thoſe that ſo reſiſt, may happen to be ſlain, yet the Fault will lie at their own Doors, for hindring the Execution of right, and that which the Law moſt juſtly approves of.

Vita autem ſubditorum innocentium, ut ex tali cauſa obligatur, fortè creditum fuit apud aliquos populos, eo nimirum quod crederent unicuique hominum jus vitæ plenum eſſe in ſe, & ad rem publicam potuiſſe transferri, quod minime eſt probabile, nec ſanctiori Theologiæ conſentaneum. Grotius de Jure belli lib. 3. *c.* 2. §. 4. And ſeems to be of opinion by the Law of Charity, that the Proſecution of right for a Man's Goods, which inevitably muſt be by the Life of Man, ought to be omitted. *Lib.* 2. *cap.* 10. *Liv. lib.* 2.

XXI. This right of changing of *Dominion* is ſo odious, that in the taking of Goods, if by any poſſibility the right Owners may have Reſtitution, the ſame hath been done; and though a larger time than 24 Hours may happen between the capture and recapture, and ſo may *pernoctare* with the Captor; yet Reſtitution may be made.

If

Prize or not Prize is of Admiral Juriſdiction.

If a Ship be Prize or not, this ſhall be tried in the Admiralty, and no Prohibition ſhall be granted. The Caſe was, there being War between us and *Denmark*, a Privateer of *Scotland* took a Ship as Prize being a *Daniſh* Ship, and ſhe was condemned as Prize by the Admiralty in *Scotland*; And brought her upon the Land, and S. libell'd in the Admiralty of *England*; and ſuggeſted that ſhe was not a *Daniſh* but a Ship of *London*, *per* Curiam, In as much that the matter is Prize or not Prize no Prohibition. *Tompſon* and *Smith* 1 *Sid.* 320. 2 *Keeble* 158. & 176.

A Ship taken at Sea as Prize ſhall be tried in the Admiralty.

Raymond 475 *Hughs* againſt *Cornelius* & *alios*.

One who had Letters of Marque in the late Wars with the *Dutch*, took an *Oſtender* for a *Dutch* Ship, and brought her into an Haven, and libelled againſt her as Prize, and the *Oſtender* libelled in the Admiralty againſt the Captor for damage ſuſtained, for the hurt the Ship ſuſtained in the Port, and a Prohibition was prayed, for this that the Suit is for damage done in the Port, for which an Action lies at the Common Law; but the Prohibition was denied, becauſe the Original being a Caption at Sea, and the bringing her into Port in order to have her condemned as Prize, is but a conſequent of it, not only the Original, but alſo the conſequences ſhall be tried there. *Turner* and *Cary cont. Neele* 1. *Lev.* 243. 1. *Sid.* 367. 2. *Keeble* 360. 364. 1. *Vent.* 173. *Radly* and *Delbow con. Eglesfield* and *Whital* 2. *Keeble* 828. and 2. *Lev.* 25. 2. *Saun.* 259.

Barthol. in Leg. ſi quid Bello D. de cap. *Ang.* & *Salic. in Leg. ab hoſtibus*, C. *de Capt. Conſt. Gall.* 20. *tit.* 13. *Art.* 24. *Conſul Maris* 287.

And therefore if he, who hath Letters of *Marque* or *Reprizal*, takes the Ships and Goods of that Nation, againſt whom the ſame are awarded, and brings the ſame into a *Neuter-Nation*, the Owners may there ſeize her, or there the *Admiral* may make Reſtitution by Law, as well of the Ship's Goods to the Owners, as the Perſons captives to their former Liberty; for that the ſame ought firſt to have been brought *infra Præſidia* of that Prince or State, by whoſe Subjects the ſame was taken.

Trin. 17 *Car.* I. *in* B. R. March *Rep.* 110. 2 *Keble* 441. *Norris* againſt *Bercley* *Res quæ infra Præſidia perductæ non-*

And with this agrees the *Common Law*; for a *Dunkirker* having taken a *French* Veſſel, ſold the ſame at *Weymouth*, whither it had been driven before it was brought *infra Præſidia Dom. Regis Hiſp.* it was in ſuch caſe ruled, that if a Ship be taken by Piracy, or Letters of *Marque* and *Reprizal*, and is not brought *infra Præſidia* of that Prince or State, by whoſe Subject the ſame was taken, the ſame

could

dum ſunt, quanquam ab hoſtibus occupatæ, Dominum non mutarunt, ex Gentium jure. could not become lawful Prize, nor were the Owners by ſuch a Caption diveſted of their Property.

But if the Caption be by Ships of War, the Property will be immediately in the Captors, and never diveſted, unleſs afterwards *vi, manu & forti* it be in Battle regained.

Vide 6 *A. c.* 13. §. 6, 7, 8. XXII. Upon the ſharing the *Spoil* of the captivated Ships, regard is had to the Ships preſent, not the Captors only; (for his Reward muſt be the Encouragement of his Prince, like the *Roman Corona's*, of which there were various, according to the Atchievement of the Conqueror,) for the Profits of Prizes are to be equally divided amongſt the Ships preſent, and not ſolely to the Captor; therefore if Letters of Reprizal are granted to two Ships, and they happen both of them at Sea to meet a Prize, and the one attacks and enters her, by means of which ſhe becomes *abſolutely* the Conqueror; yet the other hath right to an equal diſtribution with the Captor both in Ship and Goods, although he did nothing in the Conqueſt: the reaſon is, *That although he miſſed the opportunity of taking of her, yet the preſence of his Veſſel armed and prepared for Battle, at the time of taking, became a Terror to the Ship that was ſo conquered.* And by the Law preſumed *ſine ejus*, that the other Ship would not or could not be ſo taken, which Law hath paſſed the current, and approbation of the *Common Law*, as reaſonable, juſt, and equitable, and may be pretended or ſurmiſed to entitle the Party Captor to the making Reſtitution of a Moiety to his Companion then preſent. *Mich.* 32 *Eliz.* *Somers* and Sir *Rich. Bulkley's* *C. Leonard* 2. part 182.

XXIII. But if it ſhould happen, that thoſe to whom Letters of *Marque* are granted, ſhould inſtead of taking the Ships and Goods of that Nation againſt whom the ſame were awarded, wilfully take or ſpoil the Goods of another Nation in amity, this would amount to a downright **Piracy**. And the Perſons offenders would for ſuch fault create a Forfeiture of their Veſſel, and the Owners muſt be for ever concluded by the ſame, notwithſtanding ſuch *Commiſſion*. Rolls. *Abridg. fol.* 530. *Moor* 776.

XXIV. But that muſt be underſtood where ſuch a Caption is done in a Pyratical manner; for moſt certainly, if Letters of Reprizal are granted to a Man, and then he devolves the power to another, and the Party to whom the

the power is conſigned, takes the Ship and Goods of another Nation than againſt whom the ſame were awarded, but upon a violent preſumption that he made a right Caption, for that he found the Colours of ſeveral Nations in the Ship, the Mariners of ſeveral Countries, the Ship of the Built of that Country againſt whom the Letters of Reprizal were awarded, though perhaps upon a Judicial hearing the parties are reſtored to their Ship and Goods, yet the Captors are not to be puniſhed *Criminaliter*, nor the Grantee of the Letters Patents *Civiliter:* and the reaſon wherefore it was no injury in the Captors to take, did ariſe from the probable cauſe which will excuſe the Captors from puniſhment (though perhaps it will not from anſwering of the damage;) but it is clear the Grantees are excuſed from both, unleſs privy to the Caption; and the reaſon is this, for the Letters Patents do not only veſt the debt in the party, but do likewiſe give Power to the Party to recover, and is a judicial proceſs to obtain ſatisfaction, *vi, manu & forti* from the Subjects of that Prince or State againſt whom the ſame are awarded: So then it will be no more than if the Creditor deliver proceſs to the Officer to take his Debtor, and he takes a wrong Perſon without the Knowledge of the Creditor, this may ſubject the Officer to anſwer Damage to the Party taken, but not the Creditor.

Stat. 4 *H.* 5. *c.* 7. 14 *H.* 4. *c.* 4.

XXV. Therefore Letters of *Marque* or *Reprizal* iſſue not without good and ſufficient Caution firſt given for the due obſervance thereof according to Law; the Tranſgreſſion of which creates a Forfeiture of the ſame.

And therefore having taken a Prize, and brought the ſame *infra Preſidia*, the Captor muſt exhibit all the Ship-papers, and captivated Mariners to be examined, in order to adjudication, till when Bulk ought not to be broken without *Commiſſion*, nor may the Captain of the Captor ſuffer an embezzlement of the lading, or ſell, barter or diſpoſe of any part without *Commiſſion*; for the King hath a proportion in all Prizes.

3 *Eliz. cap.* 5.

Such Goods ſo brought in are not ſubject to pay Cuſtoms.

12 *Car.* II. called the Act of Navigation.

XXVI. By the Law of *Nations*, *ipſo facto*, the Dominion of the things taken by thoſe to whom Letters of

Marque

Marque are granted, become the Captors, till the Debt and Coſts, that is, the original Damage and ſubſequent charges are ſatisfied; which being done, the reſidue ought to be reſtored: So the *Venetians* uſed their equity, having taken the Ships of *Genoa*, did not ſpoil any of the lading, but preſerved the ſame very carefully, till the Debt was paid; which done, reſtitution was made of the things entirely, without diminution.

Greg. lib. 9.

XXVII. When for the fault perhaps of a few, a debt becomes *National*, by reaſon of which the Goods of the innocent become liable (if taken for ſatisfaction) whether by the Law of *England*, the party ought to have Contribution, is a queſtion moſt certain by the *Common Law*; where more are bound to one thing, and yet one is put to the whole Burden, the Party may have proceſs called *Contributione facienda* for his Relief: but when a debt becomes Univerſal or National, it ſeems otherwiſe: *For if one lends my Country Money, I will not call myſelf debtor, yet I will pay my ſhare**: So it may ſeem equitable by the Laws of Charity, though not compellable by the Laws of the Land.

Fitz. N. B. fol. 162. *Old. N. Bre.* 103. *Reg. Orig. fol.* 176.

**Seneca Benef. cap.* 19.

XXVIII. Yet when depredations have happened to Foreign Merchants, and complaint hath been made, the Kings of *England* have often iſſued forth Commiſſions to enquire of the ſame: and ſo it was done upon the Petition of ſome Merchants of *Genoa*, who complained againſt the Inhabitants of the Iſle of *Guernſey* for a depredation, in taking away and detaining their Merchandize and Goods, to the value of many thouſands of Pounds, out of a Ship wrecked by tempeſt near that Iſle, by which the Commiſſioners were empower'd *to puniſh the offenders, and to make reſtitution and ſatisfaction for the damages.*

Pat. 26 *E.* 3. *pars.* 1 *M.* 16. *Dorſo.*

The like complaint was made by the Merchants of the Duke of *Britain*, of certain depredations committed by the Subjects of the King of *England*, who iſſued forth the like Commiſſion, and to give them reparation and damages for the ſame; ſo that if the Subjects of the King of *England* have had their Goods taken by way of Reprize for the ſatisfaction of ſuch debt or damage, they may have the Benefit of the like Commiſſions to lick themſelves whole out of the Eſtates of the Offenders.

Pat. de An. 6. *H.* 5. *pars* 1. *M.* 9. *Dorſo. De Cæteris perſonis arreſt. & capiend.*

CHAP.

CHAP. III.

Of Privateers or Capers.

I. *Of Privateers, whether allowable by the Laws of Nature.*
II. *Of permiſſion of ſuch by the Laws of Nations.*
III. *The Occaſion of their firſt Inſtitution.*
IV. *Whether it be lawful to undertake ſuch an Employment.*
V. *Of Commiſſions general to endamage an Enemy.*
VI. *Of Commiſſions ſpecial and to Privateers, and the Immunities they claim by the ſame.*
VII. *They are not to violate the Law of Nations. A great Caſe on that Head.*
VIII. *Of the Care that is obliging on the iſſuing forth ſuch Commiſſions, in reference to their Regulation, and eſpecially in the laſt Treaty Marine, between* England *and* Holland.
IX. *Of Goods ſubject to Prize, how conſidered in reference to adjudication general.*
X. *Of the Goods conſidered in reference to adjudication, on Occaſions ſpecial.*
XI. *Of the Lading made Prize, whether it draws in a Forfeiture of the Veſſel, and where otherwiſe.*
XII. *Whether Ships refuſing to yield up to ſuch, life is engaged.*
XIII. *Privateers where ſubject to Puniſhment, and their Actions where Occaſion a Forfeiture of their Veſſel.*
XIV. *Of Things not ſubject to ſpoil.*
XV. *Conſiderations general on Privateers.*

I. NAturally every one may vindicate his own Right, therefore were our Hands given us; but to profit another in what we can, is not only lawful, but commendable, ſince nothing is more ſerviceable to Man than Man. Now there are divers obligations between Men which engage them to mutual Aid, for Kinſmen aſſemble and bring help, and Neighbours are called upon, and fellow *Citizens*; for it behoves every one, either to take Arms for himſelf, if he hath received Injury, or for his Kindred, or for his Benefactors, or to help his Fellows, if they be wronged. And *Solon* taught, *That Commonwealths would be happy wherein every one would think another's injuries to be his own.* But when War is denounced, it matters not what obligations are wanting, it is enough the Nation is *injured in general*; for in that every individual is wronged, and all participate in the Indignities and publick Damages of his Country; to revenge or prevent which, is the Duty of every Member of the ſame.

Leg. ſervus. D. de Serv. export. DD. ad Leg. ſi quis in ſervitutem D. de fur. Leg. probib. c. de Jure Fiſci.

Barthol. in Leg. ut vim. D. de Juſt. & Jure n. 7. & 8.

II. Since

II. Since therefore it is not againſt the *Law of Nature, to ſpoil him whom it is lawful to kill*, no wonder that the Laws of Nations permitted the Goods and Ships of Enemies to be ſpoiled, when it ſuffered their Perſons to be ſlain.

Cicero Offic. 3.

III. The approbation of which in the Wars of later Ages, hath given occaſion to Princes to iſſue forth Commiſſions to endamage the Enemy in their Commerce, and to prevent ſuch Supplies as might ſtrengthen or lengthen out War, to perſons to whom the prize or caption become abſolutely the Captors, and that to prevent the ſpare of Ships of Force to be abſent from their reſpective Squadrons or Fleets.

By thoſe of *Holland* they were termed *Capers*, by the *Spaniard* they had their denomination from their reſpective parts, as *Oſtenders*, *Dunkirkers*, and the like, in *England* call'd *Privateers*; how far the Actions of thoſe, as in relation to the attacking and killing of the Enemy, or ſpoiling of their Ships and Goods are lawful, not being commanded nor hired thereto, may be a queſtion.

The Son of *Cato Cenſorinus* having ſerved as a private Soldier of pay under *Pompilius*, the Legion being disbanded, the young man was reſolved to remain with the Army, tho' but a Volunteer; *Cato* wrote to *Pompilius* the General, that he ſhould give him an Oath the ſecond time, giving this Reaſon, *Quia priore amiſſo, jure cum hoſtibus pugnare non poterat*: *Cicero* ſets down the very Words of *Cato* to his Son, whereby he admoniſheth him not to enter into Battle; *Neque enim jus eſſe qui miles non ſit pugnare cum hoſte*. Cic. Offic. 1.

IV. By the Laws of Nations (as hath been ſaid) it is lawful for every Subject of that Nation in War to ſeize upon the Enemy's Goods and Ships, as alſo to kill them; for they are, after War denounc'd by Law, look'd upon as of no account; and if reſpect be had to natural and internal Right, it ſeems granted to every one in a juſt War to do thoſe Things, which he is confident within the juſt meaſure of warring, to be advantageous to the innocent party: but though there may be ſuch authority given, yet what title can they claim or appropriate to themſelves of the Ships or Goods of Enemies, (for ſurely there is nothing owing to ſuch, nor are they lawfully called to the ſame) unleſs they can ſhrowd themſelves under the Protection of this, that what they do, is only to exact puniſhment from the Enemy by the common right of men.

V. Commiſſions to kill or ſpoil the Enemy are in two reſpects, either general or ſpecial: General as in a tu-

mult; among the *Romans* the *Conſul* ſaid, *Whoſoever would have the Commonwealth ſafe, let him follow me*; and to all particular ſubjects is ſometimes granted a Right of killing in ſelf-defence, when it is publickly expedient, as on a ſudden occaſion, and the like.

VI. Special Commiſſions are ſuch as are granted to thoſe that take Pay, and are under Orders; the not obeying of which may be puniſhed with Death, though the act ſucceeds well. *Leg. Deſertorem. D. de re milit.*

Others to repair a particular damage by way of *Reprize*, the original damage being turned into a National debt, but that ſatisfied, the other determines: or elſe to thoſe who receive no pay, but go to War at their own charge; and that which is more, adminiſter at their own coſts a part of a War, by providing Ships of Force, and all other military proviſions to endamage the Enemy or their Confederates, the which are termed *Privateers*, &c. as above, to whom inſtead of pay is granted leave to keep what they can take from the Enemy; and though ſuch Licence is granted them, yet may they not convert of their own Heads to their private uſe thoſe Prizes, before the ſame have been by Law adjudged lawful to the Captors, and the Admiral had his ſhare. *C. Quando liceat unicuique Leg. 1. & 2.*

VII. Nor may ſuch Privateers attempt any thing againſt the Laws of Nations, as to aſſault or endamage an Enemy in the Port or Haven, under the protection of any Prince or Republick, be he Friend, Ally, or Neuter, for the peace of ſuch places muſt be kept inviolably.

Sir *Kenelm Digby* having obtained a Commiſſion againſt the *French*, being in the *Straights*, was every where honoured as a *Cavalier* whom the King of *Great-Britain* favoured; in his Voyage he took ſome Prizes, and coming to *Algier* redeemed ſeveral Captives, whom he took aboard, and placed in the ſeveral Veſſels he had made prize of: the which he ſo effected, that in a ſhort time he became *Illuſtriſſimo* of ſix Ships of War; coming to *Cape Congare*, ten leagues from *Scanderoon*, and having ſent a Boat to deſcry the road, word being brought that there were in the road two *Venetian* Galeaſſes, with two other Galleons, two *Engliſh* Ships, and ſeveral *French* Ships, Sir *Kenelm* being ſatisfied of the Prize, reſolved to attack them the next morning, although the Admiral

of the *Venetians* had declared himſelf Protector of the *French*, and that he would deſtroy all the *Engliſh* Ships of War that he ſhould meet, either in that *Republick*'s or *Grand Signior*'s Seas. Sir *Kenelm* notwithſtanding reſolved to engage them, and accordingly bore up to them, and the *Venetian* General weigh'd Anchor to meet him; Sir *Kenelm* before he fired, ſent a *Settee* to inform the *Venetian* of his Quality, and of his Commiſſion, *being only to endeavour to make prize of the French*, and giving him all the aſſurance poſſible of his friendſhip and reſpect to the Republick; but before the *Settee* was anſwered, the engagement was begun by the *Engliſh*, *French*, and *Venetian*. This Action of Sir *Kenelm Digby* was queſtioned by the *Turk*; for that Hoſtility had been committed by the *Engliſh* in the *Grand Seignior*'s Road, and thereupon the *Baſſa* of *Aleppo* and *Cady* of *Scanderoon* made an *Avania* or *Embargoe* on the *Engliſh* Merchants, till reparation was made, for the breaking the Peace of the Port.

This matter was highly debated at the Council-Board on the complaint of *Landy* then Ambaſſador for that Republic at *London*, *Anno* 1629. *Vide Hiſt. Republic. Venet. fol.* 170.

VIII. In the granting of ſuch private Commiſſions there is always great care to be had and taken by caution, to preſerve the Leagues of our Allies, Neuters and Friends, according to their various and ſeveral Treaties; and therefore at this day by the late Treaty between His Majeſty and the *States* of *Holland* at *London*, before any *Privateer* or *Caper* can receive Commiſſion, the Commander is obliged to enter before a competent Judge, good and ſufficient ſecurity by able and reſponſible Men, who have no part or intereſt in ſuch Ship, in 1500 *l. Sterling*, or 15,500 *Gilders*; and when they have above an hundred and fifty Men, then in 3000 *l.* or 33000 *Gilders*, that they will give full ſatisfaction for any damage or injuries, which they ſhall commit in their courſes at Sea, contrary to that Treaty, or any other Treaty made between His Majeſty and that *State*, and upon pain of Revocation and Annullity of their Commiſſions; and for anſwering of ſuch damage or injuries, as they ſhall do, the Ship is made liable.

Treaty Marine. at Lond. Decem. 1. 1674. In the Commiſſion muſt always be mentioned that they have given ſuch ſecurity.

There is a Proviſion to the like Effect between us and the *French* on the laſt Peace.

IX. If a Suit be commenced between the *Captor* of a Prize and the *Claimer*, and there is a Sentence or a *Decree* given for the party reclaiming; ſuch Sentence or Decree

(upon

(upon ſecurity given) ſhall be put in execution, notwithſtanding the Appeal made by him that took the Prize, which ſhall not be obſerved in caſe the Sentence ſhall be given againſt the Claimers; if torture, cruelty, or barbarous uſe happens after a Caption, to be done to the Perſons taken in the Prize, the ſame ſhall *ipſo facto* diſcharge ſuch a Prize, although ſhe was lawful, and the Captains ſhall loſe their Commiſſions, and both they and the Offenders be ſubjected to puniſhment.

Art. 13. These Articles for their excellency are fit to be a Standard to all the Nations of *Europe*. *Art.* 14.

X. Such ſorts of Inſtruments having made a caption of Ships bound for an Enemy from Nations Neuter, or in amity with both the warring States; the lading, in order to be made Prize is reduced to theſe three ſeveral heads.

In hoſtium eſſe partibus, qui ad bellum neceſſaria hoſti adminiſtrat. Conſulat. Maris editus eſt lingua Italica, in quem relatæ ſunt conſtitutiones Imperatorum Græciæ, &c. cujus libri tit. 276.

Firſt, Thoſe Goods that are fit to be uſed in War, under which are included Powder, Shot, Guns, Pikes, Swords, and all other inſtruments and proviſions of Armature fit to be uſed in the Field or at Sea.

The ſecond, are thoſe things that may be uſed in time of War and out of War, as Money, Corn, Victuals, Ships, and the like.

And the laſt, are thoſe Goods that are only fit for luxury and pleaſure.

XI. The firſt are accounted Prize without controverſy; *He is to be accounted an Enemy that ſupplies an Enemy with things neceſſary for the War.*

The ſecond is to be governed according to the ſtate and condition of the war; for if a Prince cannot well defend himſelf, or endamage the Enemy, without intercepting of ſuch things, neceſſity will then give a right to the condemnation. And ſo Queen *Elizabeth* did the *Hanſiatick* Fleet taken, laden with Corn for *Lisbon*, upon conſideration of the ſtate of the War, the ſame became prize.

Cambden Ann. 1591. By the fourth Article of the Treaty at *Lond* 1674. thoſe Goods that may be uſed out of War as in War (except Ships) may not upon any account be called prohibited, nor ſubject to a condemnation, except carried to places beſieged, *Art.* 4. See *John Meurſius* his *Daniſh* Hiſtory concerning the prohibiting of Goods by thoſe Northern States. *Vide poſtea*, the Grand Prize condemned by Q. *Elizabeth* in tit. Cuſtoms, and *vide* tit. Ships of War, §. 24.

The laſt become free, and (as we have before mentioned) according to that of *Seneca*; *I will not help him to Money to pay his Guards; but if he ſhall deſire Marbles and Robes, ſuch things hurt not others, only they miniſter to his luxury: Soldiers and Arms I will not ſupply him with; if he*

he ſhall ſeek for Players and recreations to ſoften his fierceneſs, I will gladly offer to him: Ships of War I would not ſend him, but ſuch as are for pleaſure and oſtentation of Princes ſporting in the Sea, I will not deny.

XII. If a Privateer take a Ship laden wholly with counterband Goods, both Ships and Goods may be ſubjected, and made prize.

And Perſons ſo attempting to relieve an Enemy may in ſome caſes be puniſhed; but if the ſame be done by neceſſity of obedience, though the parties are much to be blamed, they yet are not to be puniſhed; and ſo it was with thoſe which relieved Sir *John Oldcaſtle* with proviſions, who being taken, were diſcharged.

But if part be prohibited Goods, and the other part is not prohibited, but ſuch as according to the neceſſity of the War ſhall be ſo deemed, the ſame may draw a conſequential condemnation of Ships, as well as lading.

If part of the lading is prohibited, and the other part is merely luxurious and for pleaſure, only the Goods prohibited become prize, and the Ships and the remainder become free, and not ſubject to infection.

By the ſeventh Article in the *Treaty* at *London*, if the Skipper will deliver out the prohibited Goods, the Ship may proceed with the reſt in their Voyage or Courſe, as they pleaſe, and the Ship ſhall not be brought into Port.

XIII. If ſuch Ships ſhall be attacked in order to an examination, and ſhall refuſe, they may be aſſaulted, as a houſe ſuppos'd to have Thieves or Pirates in it, which refuſes to yield up their perſons, may be broken up by the Officer, and the perſons reſiſters may be ſlain.

Nec reus eſt mortis alienæ, inquit Auguſtinus, *qui ſuæ poſſeſſioni murorum ambitum circumduxit: ſi aliquis ex ipſorum uſu percuſſus intereat. Publ. Epiſt.* 154.

XIV. But if any of theſe Privateers wilfully commit any ſpoil, depredations, or any other injuries, either on the Ships of our *Friends* or *Neuters*, or on the Ships or Goods of our own Subjects, they will, notwithſtanding they are not in pay, be ſubjected in ſome caſes to Death and other puniſhments, according to the demerits of their crimes, and perhaps may ſubject their Veſſel to Forfeiture.

Leg. 5. *de Nauicul. C. lib.* 3. *Trin.* 3. *Jac. in B. R. Rolls Abridg. f.* 530.

And though by the Law of Nature the Goods of Enemies are to be ſpoiled as well as their Perſons ſlain, yet ſome Goods and things ſeem exempted, and ought not

to be ſpoiled, and therefore it is not lawful to land on the Territories of our Enemies, to ſpoil places dedicated to God: though *Pomponius* obſerves, when places are taken by the Enemy, all things ceaſe to be Sacred; the reaſon given is becauſe the things which are call'd Sacred, yet are they not indeed exempted from humane uſes, but are publick. *The Townſmen*, ſaith *Tacitus*, *opening their gates, ſubmitted themſelves and all they had to the* Romans, *themſelves were ſpared, the Town was fired.* Pompey *entred the Temple by the right of Victory, not as a ſuppliant, but as a Conqueror:* and though that privilege may ſeem right by the Law of War to a Sovereign, or a General, that intends a Conqueſt, yet that power may not ſeem devolved to him, whoſe Commiſſion is cautionally to endamage the Enemy only, as in reference to his commerce and proviſions of enabling them to withſtand the War: Certainly, that Conqueſt is poor, whoſe Trophies and Triumphs are made up with Roofs, Pillars, Poſts, Pulpits, and Pews, and the ſpoil of Agriculture. Hence it is, that at this day the king of *France* in *Germany* and the *Netherlands* accepts of Contributions, by which the Cities and Churches are not only ſpared, but even the Countrymen plough and ſow as quietly as if there were no Armies in their Territories at all.

Pompon. Leg. cum loca D. de Religioſis.

Tacit. Annal. 13.

Wars and Victories for the moſt part conſiſt in taking and overthrowing Cities, which work is not done without injury of the Goods, the walls of Cities and Temples of the Gods partake in the ſame ruin, the Citizens and Prieſts equally ſlaughtered; nor is the rapine of ſacred riches and prophane unlike: ſo many are the Sacrileges of the *Romans* as their Trophies, ſo many are their Triumphs over Gods and Nations; and then goes further, *Tot manubiæ quot manent adhuc ſimulacbra captivorum deorum. Mox & bene, Quod ſi quid adverſi Urbibus accidit, cædem clades Templorum quæ & mœnium fuerant.*

Even upon the ſame Reaſon, that the Inſtruments of Husbandmen are not to be taken for a pledge by the Civil or Common Law. *Leg. exeunt. C. quæ res pign.* Coke on Littleton 47.

XV. Moſt certain, thoſe ſorts of Capers or Privateers, being Inſtruments found out but of later Ages, and 'tis well known by whom, it were well they were reſtrained by conſent of all Princes; ſince all good Men account them but one Remove from Pirates, who without any reſpect to the cauſe, or having any injury done them, or ſo much as hired for the Service, ſpoil Men and Goods, making even a Trade and Calling of it, amidſt the Calamities of a War, and driving a commerce and mart with the ſpoil, and that with as much peace and content, as

if they had never heard of Tears, Blood, Wounds or Death, or any ſuch things: ſuch, to expoſe their lives againſt Ships of the like kind, were both honourable and juſt, or thoſe that ſhould aid the Enemy with Goods prohibited as afore, ſuch Prizes were poſſeſſions moſt noble; but the Goods, Ships and Lives of the innocent peaceable Traders to be expoſed to rapine and ſpoil, renders them worſe than the *Roman* Lictors, by how much 'tis to kill without cauſe, Headſmen executing the guilty, they the guiltleſs.

It was a high neceſſity that enforced the *Engliſh* to commiſſionate ſuch, the number of her then Enemies covering the Sea, like the *Egyptian* Locuſts; it were well they were rejected by conſent, or if allowed of, not ſubject to Quarter, when taken by Ships of War: A Trade that St *Paul* never heard of, when he ſaid, *Who goeth to War at his own charge?*

1 Cor. ix. 7.

CHAP.

CHAP. IV.

Of Piracy.

I. *Pirates what.*
II. *Of the duty incumbent on Princes and States as in reference to ſuch, and whether liable for the damages they commit.*
III. *Pirates where they hold a Society, how the ſame is eſteemed in Law, and of Equality held by them.*
IV. *Whether capable of the Solemnities of War, and Right of Legation.*
V. *Whether capable of ſuccour by the Laws of Nations.*
VI. *Ships where liable for redemption of the Maſter remaining pledge for Ship and Lading, and where not.*
VII. *Oath given to pay a reward for redemption of a Ship from Pirates, whether the ſame ought to be performed.*
VIII. *Foreigners ſpoiled by* Engliſh *Pirates, may purſue for Juſtice within the Statute of* 28 H. 8.
IX. *So where the Subjects of any Foreign Nation committing the ſame, may be puniſhed by the ſame Statute.*
X. *Piracy committed by the Subjects of a Nation in Enmity with the Crown of* England *among* Engliſh *Pirates, cannot be puniſhed by the Statute of* 28 H. 8.
XI. *Committed on the Britiſh Seas puniſhable by the Crown of* England, *and none other.*
XII. *Where committed in the Ocean, whether they may be executed without trial, by the Law of Nature.*
XIII. *The like where the Judge refuſes to try them, or in caſe of emergency, whether Juſtice may be executed immediately.*
XIV. *Pirates attempting to rob, commit a Murder, whether all principals, or only the ſlayer, and the reſt Acceſſories.*
XV. *If the Subjects of one Foreign Nation rob another, and bring the Booty into* England, *whether the party injured may proceed* Criminaliter *for puniſhment, and* Civiliter *for reſtitution.*
XVI. *Pirates take Men, and no part of the Lading, if Piracy.*
XVII. *Where a Maſter may commit Piracy of thoſe things that are committed to his charge, and where not.*
XVIII. *Where Piracy may be, though there be nothing taken: and where Goods are taken out of a Ship, and no body in it.*
XIX. *The Captain and Crew of a Veſſel having a Commiſſion of Reprize commit Piracy, whether thoſe that employed them ought to anſwer the Damage.*
XX. *Where Goods taken at Sea amount not to Piracy.*
XXI. *Goods taken and retaken by a Friend, whether the Property of the Prize is altered.*
XXII. *Of Reſtitution of Goods taken by Piracy by the Laws of* England.
XXIII. *Of Reſtitution refuſed by the Laws of* England.
Juſtifications in this by a Warrant from the Admiralty. The Admiralty muſt allow the Statute of Limitation if pleaded.
XXIV. *Of Piracy as in reference to matters Criminal, and how puniſhable at this Day by the Laws of* England.
XXV. *The Statute of* 28 H. 8. *how it operates in caſes of Piracy.*
XXVI. *Of Pardons in caſes of Piracy, Forfeitures, Corruption of Blood, and Clergy.*
XXVII. *Whether a Depredation committed in a Port within this Realm remains Robbery, at the Common Law, or Piracy by the Law Marine.*

XXVIII. *Whether Clergy is allowable for a Depredation in a Port, and if Pardons extend thereto.*
XXIX. *A Pirate arraigned and ſtanding mute ſhall have Judgment of Pain, Fort and Dure.*
XXX. *Of the Operation of the Attainder in caſes of Piracy,*
XXXI. *Of Goods taken at Sea and brought to Land, whether the Party is puniſhable by our Law, Stat.* 11. 12 *W.* 3. *c.* 7. *Piracy where and how triable.*
XXXII. *If the Admiralty claims either an original, or a concurrent Juriſdiction, the Courts above will not intermeddle.*
XXXIII. *Satisfaction of old, how made to Perſons ſpoiled at Sea.*
XXXIV. *Perſons unjuſtly detained in Cuſtody upon Suſpicion of Piracy, the Courts above, on a* Habeas Corpus, *may, if there be juſt cauſe, either bail or diſcharge them.*

I. A *Pirate* is a Sea-Thief, or *Hoſtis humani generis*, who to enrich himſelf, either by ſurpriſe or open Force, ſets upon Merchants and others trading by Sea, ever ſpoiling their Lading, if by any poſſibility he can get the maſtery, ſometimes bereaving them of their Lives, and ſinking their Ships; the Actors wherein, *Tully* calls Enemies to all, *with whom neither Faith nor Oath is to be kept.* Againſt Pirates and ſuch as live by Robbery at Sea, any Prince hath power to make War, tho' they are not ſubject to his Government. *Grot. de jure belli & pacis. lib. c. cap.* 20. § 40.

If the offenders could be found, they ought to be yielded up to Juſtice; and if they have any Eſtate, the ſame ought to go towards the reparation of the damage.

II. By the Laws of Nature, Princes and States are reſponſible for their neglect if they do not provide Ships of War, and other remedies for the reſtraining of thoſe ſort of *Robbers*; but how far they are bound, either by the *Civil Law* or *Common Law* of this Kingdom, may be ſome queſtion: for it is agreed they are not the cauſe of the unjuſt ſpoil that is committed by them, nor do they partake in any part of the plunder; but if a Prince or State ſhould ſend forth *Ships of War*, or Commiſſions for repriſe, and thoſe inſtead of taking prizes from the Enemy, turn Pirates and ſpoil the Subjects of other Friends, there has been ſome doubt, whether they ought not to make ſatisfaction to the Parties injured, in caſe the offenders ſhould prove unable. Surely there is no more reaſon for this latter than the firſt; ſeeing Princes and States may give all their ſubjects power to ſpoil the Enemy, nor is ſuch a Permiſſion any cauſe why damage was done to our Friends, when even *private* Men, without any ſuch permiſſion, might ſend forth *Ships of War*; beſides it is impoſſible that *Princes* or *States* ſhould foreſee, whether they

Caution is commonly taken upon the giving forth of ſuch Commiſſions to

they would prove ſuch or not; nor can it be avoided, but we muſt imploy ſuch, otherwiſe no *Army* or *Fleet* could be prepared; neither are Kings to be accuſed if their Soldiers or Mariners wrong their Confederates, contrary to their commands, though they are obliged to puniſh and yield up the Offenders, and to ſee that legal Reparation be made out of the Eſtate of the Pirates. If *Letters of Marque* or *Reprizal* be granted out to a Merchant, and he furniſhes out a Ship with a Captain and Mariners, and they inſtead of taking the Goods or Ships of that Nation againſt whom their *Commiſſion* is awarded, take the Ships and Goods of a Friend, this is *Piracy* *; and if the Ships arrive in *England*, or in any other of his Majeſty's Dominions, the ſame ſhall be ſeized, and the Owners for ever loſe their Veſſel †.

prevent the ſame, if poſſible. They are generally reſtrained by Proclamation when a War breaks forth, and commanded that none preſume to ſet forth without a Commiſſion.

* *Conſtit. Galliæ tom.* 3. *tit.* 3. *Conſtitutions Anni* 1583. *cap.* 44. *Vide etiam tom. conſtit.* 3. *tit.* 2. *conſtit. Anni* 1543. *cap.* 44. *Vide* 21. Article at the Treaty at *Breda* between *England* and *Holland*, and the 15th Article in the Marine Treaty at *London* 1674.

† 1 *Rolls Abr.* 530. 776.

From hence it is, that Princes and States are very cautious upon this we call *Jure Belli privati*, how they engage themſelves, or thoſe who ſeek reparation for wrongs before received; for the Perſon *injured* governs not the action, but devolves the power to ſome other hired for that particular uſe, whoſe Law is no more than this, *There is moſt right where is moſt pay or prize.* Unhappy ſtate of man, whoſe ſupport and living is maintained only by expoſing himſelf to Death; a Calling that nothing can make honeſt, but the higheſt neceſſity or pious charity. And therefore thoſe that iſſue forth ſuch ſort of *Commiſſions*, generally take Caution for their returning within a convenient Time, and not to wander in that unhappy condition.

III. Though Pirates are called Enemies, yet are they not properly ſo termed: *For he is an Enemy*, ſays *Cicero*, *who hath a Commonwealth, a Court, a Treaſury, Conſent and Concord of Citizens, and ſome way, if occaſion be, of Peace and League*; and therefore a Company of *Pirates* or *Freebooters* are not a Commonwealth, though perhaps they may keep a kind of *equality* among themſelves, without which no Company is able to conſiſt; and though it is ſel-

Leg. Hoſtes de verb. ſignif.

dom

Leg. Hoſtis de Captivis. dom they are without fault, yet they hold ſociety to maintain *right*, and they do right to others, if not in all Things according to the *Law of Nature* (which among many people is in part obliterated) at leaſt according to *agreements* made with many other Nations: or according to Cuſtom: So the *Greeks*, at what Time it was accounted lawful to take ſpoil at Sea, abſtained from ſlaughter and depopulations, and from ſtealing Oxen that plowed, as the *Scholiaſt* upon *Thucydides* obſerves; and other Nations living alſo upon the ſpoil when they were come home from Sea, ſent unto the Owners to redeem (if they pleaſed at an equal rate) what they were robbed of at Sea: and at this day, if a Ship hath the Emperor of *Barbary*'s protection, the Pirates of that Nation (if they ſeize) will reſtore, and if there be no protection, yet if taken within *ſight* of their Caſtles, the Prize is not abſolute; but if reſiſtance is made, and there be a Caption, ſhe then becomes the Captor's for ever, *as the price of Blood.*

Grot. de Jure belli & pacis lib. 2. c. 18. §. 2. IV. Again, Pirates that have reduced themſelves into a Government or State, as thoſe of *Algier*, *Sallee*, *Tripoli*, *Tunis*, and the like, ſome do conceive ought not to obtain the Rights or Solemnities of War, as other Towns or places: for though they acknowledge the Supremacy of the * *Porte*, yet all the power of it cannot impoſe on them more than their own Wills voluntarily conſent to. The famous *Carthage* having yielded to the victorious *Scipio*, did in ſome reſpect continue, and began to raiſe up her drooping Towers, 'till the knowing *Cato* gave Counſel for the total extirpation; out of the Ruins of which aroſe *Tunis*, the revenging Ghoſt of that famous City, who now, what open Hoſtility denied, by Thieving and Piracy continue; as ſtinking Elders ſpring from thoſe places where noble Oaks have been fell'd; and in their Art are become ſuch Maſters, and to that degree as to diſturb the mightieſt Nations of the Weſtern Empire: and though the ſame is ſmall in bigneſs, yet it is great in miſchief: the conſideration of which put fire in the Breaſt of the aged *Lewis* IX. to burn up this neſt of Waſps, who having equipt out a Fleet in his way for *Paleſtine*, reſolv'd to beſiege it: whereupon a Council of War being called, the queſtion was Whether the ſame ſhould be ſummoned? and carried, it ſhould not; *for it was not fit the ſolemn Ceremonies of War*

* *Conſtantinople*, generally ſo called.

Fuller's Holy War lib. 4. cap. 27.

ſhould

ſhould be laviſhed away on a company of Thieves and Pirates. Notwithſtanding this, *Tunis* and *Tripoli*, and their Siſter *Algier* do at this day (though neſts of Pirates) obtain the right of Legation, and Sir *John Lawſon* did conclude a Peace between his Majeſty by the Name of the moſt Serene and Mighty Prince Charles the *Second, by the Grace of God King of Great* Britain, France, *and* Ireland, *Defender of the Faith*, &c. *and the moſt Excellent Signiors* Mahomet Baſhaw, the Divan of the Noble City of Tunis; Hagge Muſtapha Dei, Morat Bei, *and the reſt of the Soldiers in the Kingdom of* Tunis: and with them of *Tripoli* by Sir *John Narborough* * *by the Name of* Halil Baſhaw, Ibrahim Dey, Aga, Divan, *and Governours of the Noble City and Kingdom of* Tripoli *in* Barbary. So that now (though indeed Pirates) yet having acquired the Reputation of a Government, they cannot properly be eſteemed Pirates but Enemies.

Octob. 5. *Anno* 1662. But by the *Turk* in theſe words, confirmed and ſealed in the preſence of Almighty God, in our Houſe in the noble City of *Tunis*, the laſt day of the Moon *Delcadi* and the year of *Hegira* 1085.

* *March* 5, 1675-6, and (afterwards, *May* 1. 1676. by the *Turks*) being the 26th day of the Moon *Zaphire*, and the year of the *Hegira*, 1087.

V. Pirates and Robbers that make not a Society, *i. e.* ſuch a Society as the Law of Nations accounts lawful, are not to have any ſuccour by the Law of Nations. *Tiberius*, when *Tacfarinas* had ſent Legates to him, he was diſpleaſed that both a Traitor and a Pirate ſhould uſe the manner of an Enemy, as *Tacitus* hath it; yet ſometimes ſuch men (Faith being given them) obtain the right of Legation, as the Fugitives in the *Pyrenean* Foreſt, and the *Banditti* at *Naples*; and *Solyman* the Magnificent, having entertained *Barbaroſſo* the famous Pirate, ſent word to the *Venetians*, *that they ſhould uſe him and eſteem him no more as a Pirate, but one of their own Port.*

Tacit. Annal. 3. *Cæſar lib.* 3 *de Bello Civ.*

Hiſt. Republ. Venet. fol. 91.

VI. If a Ship is aſſaulted by a Pirate, for redemption of which the Maſter becomes a Slave to the Captors, by the Law Marine, the * Ship and Lading are tacitly obliged for his redemption by a general Contribution. But if a Pirate ſhall feign himſelf ſtranded, and to decoy the Merchant-Man for his relief, ſhall fire his Guns, or wave his Colours, who accordingly varies his Courſe for his Aſſiſtance, and the Pirate enters him, for redemption of which he becomes

ff. ad Legem Rhod. de jactu. l. 2. §. *ſi navis à Piratis redempta.*

* The ſame Point, and alſo in Caſe of Capture by an Enemy, Lord *Raymond* 933.

comes a Slave to the Pirate, there contribution ſhall not be made, becauſe it was his folly to be ſo decoy'd.

To know whether the Proceedings in ſuch Matter be legal, the Party muſt wait till the Promovent has libelled, before he can move for a Prohibition. *Ibid.* 934.

VII. By the *Civil Law* a Ranſom promiſed to a Pirate, if not complied with, creates no wrong; and the reaſon given is, for that the Law of Arms is not communicated to ſuch, neither are they capable of enjoying that privilege which lawful enemies may challenge in the Caption of another: however this hath its meaſure; for a Pirate may have a lawful poſſeſſion, the which he cannot be denied (if injury or wrong be done him) to claim the benefit of Law. But the reaſon of that ſprings from a more noble Fountain, which is his taking a legal courſe, for by that he hath ſubmited to the Magiſtrate, and paid obedience to the Laws in demanding Juſtice; beſides, the ſame is not done ſo much in favour of the Pirate as in Hatred of him who firſt commits the wrong. *Auguſtus* the Emperor proclaimed a reward of ten Seſterces to be given him that ſhould bring in *Coracotas*, the famous *Spaniſh* Pirate, who having notice of the ſame, voluntarily comes and preſents himſelf before the Emperor, and demands the promiſed reward; and the queſtion was, whether death or the Seſterces were to be his reward: The Emperor gave Judgment, that the ſum promiſed, ſhould be paid him, for otherwiſe in taking away his life he ſhould deceive him of the ſum promiſed, which would, in effect, violate the publick Faith given to him, who of himſelf offered himſelf upon the tryal of Juſtice.

Bodin. l. 1. c. 1.

A Pirate attacks a Merchant-Man, and enters her, for redemption of which the Maſter gives his Oath, at a time and place to pay the Pirate a Sum certain; by ſome it hath been held, that the Maſter commits not perjury, if the price promiſed for redemption be not brought according to the Oath; becauſe a Pirate is not a determinate, but a common Enemy of all, with whom neither Faith nor Oath is to be kept: but that is no reaſon for the aſſoiling of the Vow: for though the Perſon be deficient, yet the Juſt God is concerned; nor can that perſon that hath promiſed a thing, ſatisfy his Conſcience after he hath once delivered it to him, to recover it back again;

Leg. bona fide D. Expoſ.

again; for the words in an Oath, as to God, are to be underſtood moſt ſimply, and with effect; and therefore he that returned ſecretly to the Enemy, and again departed, made not good his Oath concerning his Return.

VIII. If an *Engliſh Man* commit Piracy, be it upon the Subject of any Prince or Repulick in amity with the Crown of *England*, he is within the purview of the *Stat.* of 28 *H.* 8. and ſo it was held where one *Winterſon*, *Smith*, and others, had robbed a Ship of one *Maturine Gantier*, belonging to *Bourdeaux*, and bound from thence with *French* Wines for *England*, and that the ſame was Felony by the Law Marine, and the parties were convicted of the ſame. On a Commiſſion grounded on the Stat. awarded. *Rott. Adm.* 28 *Eliz. m.* 23.

IX. And ſo if the Subject of any other Nation or Kingdom, being in Amity with the King of *England*, commit Piracy on the Ships or Goods of the *Engliſh*, the ſame is Felony, and puniſhable by virtue of the *Stat.* and ſo it was adjudged, where one *Careleſs*, Captain of a *French Man* of War of about 40 Tuns, and divers others, ſetting upon four Merchant-Men going from the Port of *Briſtol* to *Caermathen*, did rob them of about 1000 *l.* for for which he and the reſt were arraigned, and found guilty of the *Piracy*. *Rott. Adm. anno* 28 *Eliz. m.* 24.

But before the *Stat.* of 25 *Ed.* 3. if the ſubjects of a foreign Nation and ſome *Engliſh* had joined together, and had committed Piracy, it had been Treaſon in the *Engliſh*, and Felony in the Foreigners: And ſo it was ſaid by *Shard*, where a *Norman* being Commander of a Ship, had together with ſome *Engliſh*, committed Robberies on the Sea, being taken, they were arraigned and found guilty; the *Norman* of Felony, and the *Engliſh* of Treaſon, who accordingly were drawn and hang'd. But now at this day they both receive Judgment as Felons by the Laws Marine. *Normandy* was loſt by King *John*, and out of the ligeance of the King of *England*, and they were as now accounted Aliens, 42. *Aſſiſe placit* 25. *per Shard. vid.* 2 *H.* 5. *cap.* 6.

X. If the Subjects in enmity with the Crown of *England* be Sailors aboard an *Engliſh* Pirate with other *Engliſh*, and then a Robbery is committed by them, and afterwards are taken, it is Felony without controveſy in the *Engliſh*, but not in the *Strangers*; for they cannot be tried by virtue of the Commiſſion upon the *Statute*, for it was no Piracy in them, but the Depredation of an Enemy, for which they ſhall receive a Trial by **Martial Law**, and Judgment accordingly.

XI. Piracy

Selden Mare Clauſ. lib. 1. *cap.* 27. *Caſe of Reginor Grimbald in temp. Ed.* 1. Cited in 4 *Inſt. fol.* 142. in c. of the Admiralty.

XI. Piracy committed by the Subjects of the *French* King, or of any other Prince or Republick, in amity with the Crown of *England*, upon the *Britiſh* Seas, is puniſhable properly by the Crown of *England* only, for the Kings of the ſame have *iſtud regimen & dominium excluſivè* of the Kings of *France*, and all other Princes and States whatſoever.

XII. If Piracy be committed on the *Ocean*, and the Pirates in the Attempt there happen to be overcome, the Captors are not obliged to bring them to any port, but may expoſe them immediately to puniſhment, by hanging them up at the Main-yard end before a Departure; for the old natural liberty remains in places where are no Judgments.

Injicere manum parcæ traxerunt debitum ſibi, & ſermone uſus eſt juris; nam manus injectio dicitur, quoties nulla judicis auctoritate, rem nobis debitam vindicamus. Serv. Æn. 11.

And therefore at this Day, if a Ship ſhall be on a Voyage to the *Weſt-Indies*, or on a Diſcovery of thoſe parts of the unknown World, and in her Way be aſſaulted by a Pirate, but in the Attempt overcomes the Pirate, by the Laws Marine, the Veſſel is become the Captors; and they may execute ſuch *Beaſts of Prey* immediately, without any Solemnity of Condemnation. If we reſpect expletory Juſtice, it cannot be denied, but for the Conſervation of Ship and Goods, a Pirate invading may be ſlain, for the inequality between theſe things and life is made up in favour of the innocent, and by hatred to the injurious: Whence it follows, if we regard only that Right, that a Pirate running away with ſtolen Goods, if they cannot otherwiſe be recovered, may be ſunk. *Demoſthenes* ſaid, *It was very hard and unjuſt, and contrary both to the written Laws and the common Rules amongſt Men, not to be ſuffered to uſe Force againſt him who in a hoſtile manner hath taken my Goods.*

Oratione in Ariſtocratem.

Leg. extat. D. quod metus.

XIII. So likewiſe, if a Ship ſhall be aſſaulted by Pirates, and in the Attempt the Pirates ſhall be overcome, if the Captors bring them to the next port, and the Judge openly rejects the Trial, or the Captors cannot wait for the Judge without certain peril and loſs, Juſtice may be done upon them by the Law of Nature, and the ſame may be there executed by the Captors.

Honorius & Theodoſius; idcirco Judiciorum vigor Juriſque publici tutela in medio conſtituta, ne quiſquam ſibi ipſi permittere valeat ultionem. Leg. nulli C. de Judæis.

Caius

Caius Cæſar being but a private Man purſued the Pirates, by whom he formerly had been taken and ſpoiled, and making up to them with ſuch a Fleet as he poſſibly in haſte could get ready, attacked, burnt, and deſtroyed their Ships, and the Men he brought back to an Anchor, where repairing to the *Proconſul* to do Juſtice, and he neglecting, himſelf turned back, and there hang'd them up.

Plutarch. in Cæſar.

XIV. If a Pirate at Sea aſſault a Ship, but by force is prevented entring her, and in the attempt the pirate happens to ſlay a perſon in the other Ship, they are all *Principals* in ſuch a Murder, if the *Common Law* hath Juriſdiction of the cauſe: but by the Law Marine, if the parties are known, they who gave the wound only ſhall be *principals*, and the reſt *acceſſories* *; and where they have cognizance of the principal, the Courts at *Common Law* will ſend them their acceſſory, if he comes before them †.

* *Ralph Williams* indicted for the murder of one *John Terrey*, and *Bridget*, *Black*, and others as Acceſſories. *Rot. Admir.* 28. *Eliz. M.* 24.

† *Yelverton fol.* 134, 135.

XV. If a *Spaniard* robs a *French* Man on the High Sea, both their princes being then in amity, and they likewiſe with the King of *England*, and the Ship is brought into the ports of the King of *England*, the *French* Man may proceed *Criminaliter* againſt the *Spaniard* to puniſh him, and *Civiliter* to have Reſtitution of his Veſſel: but if the Veſſel is carried *infra Præſidia* * of that prince, by whoſe ſubject the ſame was taken, there can be no proceeding *Civiliter*, and doubted if *Criminaliter*; but the *French-Man* † muſt reſort into the Captor's or Pirate's own Country, or where he carried the Ships, and there proceed.

Res quæ intra Præſidia perductæ nondum ſunt, quanquam abhoſtibus occupatæ, domiuum non mutârunt ex Gentium jure. Grotius de Jure belli ac Pacis, c. 9. §. 16.

* March's Reports 110.

† *Leg. Hoſtes & Leg. Latrones D. de Cap. Leg. poſtlim à Piratis eod. Tit.*

A *Dutchman*, but naturalized by the Duke of *Savoy*, and living at *Villa Franca*, in his Dominions, procures a *Commiſſion* from the *States* of *Holland*, and coming to *Legborn*, there rid with the Colours and Enſigns of the Duke of *Savoy*; the Ship *Diamond* being then in port, and having received her Lading, was afterwards in her Voyage home ſurpriſed by that Caper, and brought into *Villa*

The Caption was in 1665. Adjudication paſſed *May* 13. 1670. upon which there was an Appeal to the Duke of *York*; but

Franca,

Franca, and there condemned and ſold to one *Poleman*; which Ship afterwards coming for *England*, the Plaintiffs having Notice, made a ſeizure; and upon Trial, Adjudication paſſed for the Plaintiffs, the original Proprietors: For tho' the Ship of War and the Captors were of *Savoy*, and carried thither; yet being taken by virtue of a *Dutch Commiſſion*, by the *Law Marine*, ſhe muſt be carried *infra Præſidia* of that Prince or State by virtue of whoſe *Commiſſion* ſhe was taken. Nor can ſuch carrying of the Enſigns or Colours of the Duke of *Savoy*, who was then in amity with the Crown of *England*, or the *Commander*, though a ſubject of that Prince, make him a Pirate, or ſubject them or thoſe to whom they have transferr'd their intereſt of the prize, any ways to be queſtioned for the ſame *Criminaliter*; for that the original *quoad* the taking was lawful, * *as one Enemy might take from another*; but *Civiliter* the ſame might be, for that the Captor had not entituled himſelf to a firm poſſeſſion †. And therefore in all caſes where a Ship is taken by *Letters of Marque or Piracy* *, if the ſame is not carried *infra Præſidia* of that Prince or State by whoſe Subject the ſame was taken, the Owners are not diveſted of their Property, but may reſeize whereſoever they meet with their Veſſels.

nothing came of it.

Rott. Admir. in An. ſupradict.

* 3 *Bulſtrode* 28.

† *Grotius, lib.* 3. *cap.* 9. §. 15. & 16.

* *Mich.* 8. *Jac. in B. R. Brownlow* 2 *part. Weſton's C.*

XVI. If a Pirate attacks a Ship, and only takes away ſome of the Men, in order to the ſelling them for ſlaves, this is Piracy by the Law Marine; but if a Man takes away a *Villain* or *Ward*, or any other Subject, and ſells them for ſlaves, yet this is no robbery by the *Common Law*.

C. 2 *Inſt.* 109. *lib.* 8. *fol.* 32. 6. *Caly's* C. but Black-mail, and ſuch ſorts of taking in *Cumberland, Northumberland*, and *Weſtmorland* was made Felony 43. *Eliz. cap.* 13.

XVII. If a Bale or Pack of Merchandize be delivered to a Maſter to carry over Sea to ſuch a Port, and he goes away with the whole Pack or Bale to another Port, and there ſells and diſpoſes of the ſame, * the ſame is no Felony. But if he opens the Bale or Pack, and take any thing out, *animo furandi*, the ſame may amount to ſuch a Larceny, as he may be indicted in the *Admiralty*, though it amounts not to a Piracy. Yet if ſuch a Maſter of Ship ſhall carry the Lading to the Port appointed, and after retakes the whole

* *ff. Nautæ Caup. l.* 1. *ſect.* 3 *Stab. Glanvil. lib.* 10. *cap.* 13. 13 *Ed.* 4. 9. *Nautæ Caup. Stab. lib. ſect.* 7. *ſect. recepit.*

whole Pack or Bale back again, this may amount to a Piracy; for he being in the nature of a Common Carrier, the delivery had taken its effect, and the Privity of the Bailment is determined. Co. 3. *Inſt.* 107, 108.

XVIII. If a Pirate ſhall attack a Ship, and the Maſter for the Redemption ſhall give his Oath to pay a Sum certain; though there be no taking, yet is the ſame Piracy by the *Law Marine*; but by the *Common Law* there muſt be an actual taking, though it be but to the value of a Penny, as to a Robbery on the Highway. 44 *E.* 3. 14. 4 *H.* 4. 2. §. *ad Leg. Rhod. de jact.* l. 2. §. *ſi navis à Piratis redempta ſit.*

If a Ship ſhall ride at Anchor, and the Mariners ſhall be part in their Ship-boat, and the reſt on the ſhore, and none ſhall be in the Ship; yet if a Pirate ſhall attack her and rob her, the ſame is Piracy. 14 *E.* 3. 115.

XIX. A Merchant procures Letters of *Marque* or *Repriſe*, and then delivers the Commiſſions to perſons to endeavour a ſatisfaction; if ſuch Perſons commit Piracy, the Veſſel is forfeited without controverſy: But the Merchant is no ways liable to make ſatisfaction; for though the Superior ſhall anſwer for the Actions of his Miniſters or Servants, yet that is introduced by the *Civil Law*; but this queſtion muſt be decided by the *Law of Nations*, by virtue of which ſuch *Commiſſions* are awarded or granted, the which does exempt any Man to anſwer for the Damages of his Servants, unleſs he foreknew that they would commit ſuch a Piracy or Spoliation, or any way have abetted or conſented to the ſame, which right may be forfeited, and the *Civil Law* let in to acquire ſatisfaction. And yet in the Caſe of Sir *Edmond Turner*, and Mr *George Carew*, who having Letters of Reprizal againſt the *Dutch*, Mr *Carew* by Indorſement on the back-ſide of the Letters Patents did nominate and appoint one *Tyrence Byrne* to execute and perform all ſuch acts and things as by force of the Letters Patents he might lawfully do: *Tyrence Byrne* provides Ship and Crew, and being at Sea takes a certain Ship belonging to *Bruges* called the *Godelife*, and there was ſome probable cauſe of ſuſpicion, yet not enough to warrant a Condemnation: Whereupon the Owners, having had ſentence of Reſtitution, libell'd in the *Admiralty* againſt Sir *Edmond Turner*, Mr *Carew* and *Byrne*, for Damages; upon which a Sentence was given againſt the Defendants, *Trin.* 7 *Jac.* in B. R. Rolls Abridg. 530. *Conſtit. Galliæ tom.* 3. *tit.* 3. *Conſtit. anni* 1583. *c.* 44. *Vide* Moor's Reports 776. *Vide* the very Letters of Reprizal, *ante fol.* 34. *Hill.* 30, 31. *Car.* 2 at *Serjeants-Inn.*

dants, who Appealing, the Delegates confirmed the firſt Sentence.

Leg. 2. ſect. cum in eadem: D. ad l. Rhod. Leg. quo naufrag. §. quod ait. D. de incen. Leg. quemadmodum, ſect. item D. ad Leg. Aquiliam.

XX. But if a Ship ſhall be at Sea and in neceſſity, if ſhe attacks another Ship, and takes out ſome Victuals, Cables, Ropes, Anchors or Sails, (eſpecially if that other Ship may ſpare them) this is not *Piracy*; but then the Party muſt pay ready Money for ſuch things, or give a Note or Bill for the payment of the value; if on this ſide the *Straits* of *Morocco*, within four Months, if beyond within twelve Months.

27 H. 8. cap. 4. §. 4. Per Leg. Pomponius de acqu. rer dom.

XXI. By the *Law Marine*, if Goods are taken by a Pirate, and afterwards the Pirate attacks another Ship, but in the Attempt is conquered, the *Prize* becomes abſolutely the Captor's, ſaving the account to be rendred to the *Admiral*. And it is accounted in Law a juſt Caption of whatſoever may be got or taken from ſuch *Beaſts of prey*, be the ſame in their own or in their Succeſſors Poſſeſſion. But then an account ought to be rendred to the *Admiral*, who may (if they happen to be the Goods of the Fellow-ſubject of the Captors, or of Nations in amity with his own Sovereign) make reſtitution to the Owner; the coſts and charges, and what other things in equity ſhall be decreed to the Captor, firſt conſidered and deducted.

Per Leg. Mulier, eod. cap. & poſt.

3 Bul. 28, 29. March 110.

XXII. By the *Statute* of 27 *Edw.* 3. *cap.* 13. if a Merchant loſe his Goods at Sea by Piracy, or Tempeſt (not being wreckt) and they afterwards come to Land; if he can make proof they are his Goods, they ſhall be reſtored to him in places *Guildable*, by the King's Officers and ſix Men of the Country; and in other places by the Lords there and their Officers, and ſix Men of the Country. If a Pirate takes Goods upon the Sea, and ſell them, the Property is not thereby changed, no more than if a Thief upon the Land ſteals them and ſells them. *Godb.* 193. *Barber*'s Caſe.

Sigonius de Jure Rom. l. 1. c. 11.

This Law hath a very near relation to that of the *Romans*, called *De Uſu-Captione* or the *Atinian* Law; for *Atinius* Enacted, That the Plea of Preſcription or long poſſeſſion, ſhould not avail in things that had been ſtoln, but the Intereſt which the right Owners had ſhould remain perpetual; the words of the Law are theſe, *Quod*

ſurreptum

ſurreptum eſt, ejus rei æterna auctoritas eſſet, where by *Auctoritas* is meant *Jus Dominii*.

XXIII. Yet by the *Common Law of England*, it has been held, That if a Man commit Piracy upon the Subjects of another Prince or Republick (though in League with us) and brings the Goods into *England*, and ſells them in a Market *Overt*, the ſame ſhall bind, and the owners are for ever concluded; and if they ſhould go about in the *Admiralty* to queſtion the Property, in order to Reſtitution, they will be prohibited. (*a*) *Hob.* 79.

Bingly's Caſe 1. *Roll*'s Abridgment, *fol.* 530 *Lit.* C. 4. *Grotius, lib* 3. c. 9. *ſect.* 16.

(*a*) This is a Report of two Caſes where a prohibition was granted, becauſe the contract was made on Land and under Seal: and ſo not to the purpoſe. *Sed vid. Cro. El.* 685. *Yelv.* 135. 1 *Sid.* 320, 367. 2*d. Saun.* 260. 2*d. Lev.* 25. 1*ſt. Ven.* 173, 308. Where it is held that if the Admiral hath Juriſdiction of the Orig. Cauſe, the Matters depending thereon ſhall be tried in the Admiral's Court, tho' they ariſe on the Land.

In Trover for Goods of 400 *l.* value, Motion was for a Trial at Bar, the Goods being taken by a *Spaniſh* Caper, and brought into *Plymouth*, and from thence Shipt away without Condemnation, becauſe tho' *Br. Property* 38. ſays the Property is altered by the Enemy's poſſeſſion above 24 hours, which is good when they are brought into ſafe Port of an Enemy's Country, yet the conſtant Opinion of the *Civilians* and the Practice at *Guildhall* in the *Dutch* War, is that if ſuch Goods be brought into a Neutral Port, or, as theſe were, into a Friend's, the Property is not altered till Condemnation, and theſe Goods were taken from a *French* Man in League with us, which is ſtronger; and this being matter of Evidence, tho' the Defendant was only a Factor in *England* could not condemn the Goods, but the condemnation was in *Holland*, whither they were ſhipt; yet the Trial at Bar was granted. 3. *Keeble* 397. *Verdale con. Marten.* Like Caſe *Radley* and *Delbow* againſt *Eglesfield & al.* 2 *Sand.* 259. 1. *Vent.* 173.

Several Perſons were Owners of a Ship, which they ſent to the *Indies* to merchandize, upon the High Sea the Mariners and Reſidue commit Piracy. Upon the Return of this Ship to the River of *Thames* the Admiral ſeiz'd her, as *Bona Pyratarum*, the Merchants took the Sails and Tackle out of the Ship. The Admiral ſhall not have the Goods ſtoln from other Men, but the Owner ſhall have them, 1 *Rol. Rep.* 285. the Caſe of *Hildebrand* and others.

XXIV. This offence was not puniſhable by the *Common Law*, as appears by the Preamble of the *Stat.* of 28 *H.* 8. *cap.* 15. but the ſame was determined and judged by the *Admiral*, after the courſe of the *Civil Law*; but by force of the ſaid *Act*, the ſame is inquired of, heard, and deter-

mined according to the courſe of the *Common Law*, as if the offence had been committed on *Land*.

But by Lord *Hale*, in *Hiſt. Pl. Cr. Vol.* 2. *p.* 14, 15. The Court of *King's-Bench* had certainly a concurrent Juriſdiction with the Admiralty, in Caſes of Felonies done upon the narrow Seas or Coaſt, though it were High Sea, becauſe within the King's Realm of *England*: But this Juriſdiction of the *Common-Law* Courts was interrupted by a ſpecial Order of the King and Council, 35 *Ed.* 3. And ſince 38 *Ed.* 3. it does not appear, that the *Common-Law* Courts took Cognizance of Crimes committed upon the High Seas.

Trial of Piracy.

Stat. 11. and 12. *W.* 3. *cap.* 7. All Piracies, Felonies, and Robberies committed in or upon the Sea, or in any Haven, River, Creeks, or Place where the Admiral hath Juriſdiction, may be tried at Sea, or upon the Land, in any of his Majeſty's Iſlands, Plantations, Colonies, *&c.* appointed for that purpoſe by Commiſſion under the Great Seal of *England*, or Seal of the Admiralty directed to ſuch Commiſſioners as his Majeſty ſhall think fit, who may commit ſuch Offenders and call a Court of Admiralty thereupon to conſiſt of ſeven Perſons at the leaſt.

And for want of ſeven, then any three of the Commiſſioners may call others as therein is mentioned.

The Perſons ſo aſſembled may proceed according to the courſe of the Admiralty, and give Sentence of Death and award execution of the Offenders, who ſhall thereupon ſuffer Loſs of Lands, Goods and Chattels.

The Regiſter of the Court, or if none be, the Preſident to take Minutes of the Proceedings and tranſmit the ſame to the Admiralty Court in *England*.

If any natural born Subjects or Denizens of *England* commit Piracy or any act of Hoſtility, againſt any of his Majeſty's Subjects at Sea, under Colour of a Commiſſion or Authority from any Foreign Prince or State or Perſon whatſoever, ſuch Offenders ſhall be adjudged Pirates.

If any Commander or Maſter of a Ship, or Sea-man or Mariner, turn Pirate, or give up his Ship, *&c.* to Pirates, or combine to yield up, or run away with any Ship, or lay violent Hands on his Commander, or endeavour

deavour to make a Revolt in the Ship, he ſhall be adjudged a Pirate and ſuffer accordingly.

All Perſons who after the 29th of *September* 1700, ſhall ſet forth any Pirate (or be aiding and aſſiſting to any ſuch Pirate) committing Piracy on Land or Sea, or ſhall conceal ſuch Pirate, or ſhall receive any Veſſel or Goods, Piratically taken, ſhall be adjudged acceſſory to ſuch Piracy, and ſuffer as Principals, according to the Statute of 28 *H.* 8. which is hereby declared to be in force.

When any *Engliſh* Ship ſhall have been defended by Fight againſt Pirates, and any of the Officers or Seamen killed or wounded, the Judge of the Admiralty or his Surrogate in *London*, or the Major, or chief Officer in the Out-Ports, aſſiſted by four Subſtantial Merchants, may by Proceſs out of the ſaid Court levy upon the Owners of ſuch Ships, *&c.* a Sum not exceeding 2 *l. per Cent.* of the Value of the Freight, Ship and Goods ſo defended, to be diſtributed among the Officers and Seamen of the ſaid Ships, or Widows and Children of the ſlain.

A Reward of 10 *l.* for every Veſſel of 100 Tuns or under, and 15 *l.* for every Veſſel of a greater Burden ſhall be paid by the Captain, Commander or Maſter, to the firſt Diſcoverer of any combination for running away with, or deſtroying any ſuch Ship at the Port where the Wages are to be paid.

The Commiſſioners aforeſaid ſhall after the 29th of *September* 1700, have the ſole power of trying the ſaid Crimes, and Offences within the Colonies and Plantations in *America* governed by Proprietors, or under Grants or Charters from the Crown, and may iſſue their Warrants for apprehending ſuch Pirates, *&c.* and their Acceſſories in order to their being tried there, or ſent into *England*.

Commiſſions for Trial of the ſaid Offences ſent to any Place within the Juriſdiction of the Cinque Ports, ſhall be directed to the Lord Warden of the Cinque Ports, or his Lieutenant, and ſuch Perſons as the Lord Chancellor ſhall appoint; and the Trial to be by the Inhabitants of the Cinque Ports.

All Seamen, Officers and Sailors, who ſhall deſert the Ships or Veſſels, wherein they are hired for a Voyage, ſhall forfeit their Wages.

If any Maſter of a Merchant Ship or Veſſel ſhall after the 29th of *September* 1700, during his being abroad, force any Man aſhoar, or wilfully leave him behind, or refuſe to bring all his Men home again, who are in a Condition to return, he ſhall ſuffer three Months Impriſonment.

The above Act 11 and 12 *W.* 3. *ch.* 7. was continued by 1 *Geo.* 1. *ch.* 25. for five Years, *&c.* and was made perpetual by 6 *Geo.* 1. *ch.* 19. And tis enacted by 4 *Geo.* 1. *ch.* 11. *ſec.* 7. that all Perſons who ſhall commit any Offence for which they ought to be adjudged Pirates, Felons, or Robbers, by 11 and 12 *W.* 3. may be tried and judged for every ſuch Offence, according to 28 *H.* 8. and ſhall be excluded from their Clergy.

By *Stat.* 8. *Geo.* 1. *ch.* 24. *Sec.* 1. If any Commander of a Ship, or other Perſon, ſhall any wiſe trade with any Pirate, or ſhall furniſh any Pirate with Ammunition or Stores, or fit out any Ship with ſuch deſign, or confederate or correſpond with any Pirate, knowing him to be ſuch, ſuch Perſon ſhall be adjudged guilty of piracy, and ſhall be tried according to *Stat.* 28. *H.* 8. *ch.* 15. and *Stat.* 11 and 12 *W.* 3. *ch.* 7. and being convicted ſhall ſuffer as a Pirate. And perſons belonging to any Ship, who ſhall upon meeting any Merchant-man upon the High Seas, forcibly board ſuch Ship, and though they do not carry off ſuch Ships, ſhall throw overboard, or deſtroy any part of her Goods, ſhall be puniſhed as Pirates.

And *ibid. ſec.* 2. Every Ship fitted out with deſign to trade with, or ſupply any Pirate, and all the Goods put on board ſuch Ship, ſhall be *ipſo facto* forfeited, one Moiety to the King, and the other to the Informer, to be recovered in the High Court of *Admiralty*.

And *ibid. ſec.* 3. All perſons declared Acceſſories by 11 and 12 *W.* 3. are hereby declared principal Offenders.

And by *ſec.* 4. Offenders convicted on this Act are excluded Clergy.

XXV. The Act 11 and 12 *W.* 3. *ch.* 7. does not alter the Offence, or make the Offence Felony, but leaves the Of-

fence as it was before this Act, *viz.* Felony only by the *Civil Law*, but giveth a mean of Trial by the *Common Law*, and inflicteth pains of death, as if they had been attainted of any Felony done upon the Land. The Indictment muſt mention the ſame to be done upon the High Sea.

Coke 3. *Inſtit. Tit. Admir.*

Note, By 2 *Geo.* 2. *ch.* 21. If any Perſon be feloniouſly ſtricken, or poiſoned upon the Sea, or at any place out of *England*, and dies in *England*, or ſtricken or poiſoned in *England*, and dies on the Sea, or out of *England*; the Fact is triable in any County, according to the Courſe of the Common Law, except Challenges for the Hundred.

XXVI. A pardon of all Felonies does not extend to Piracy, but the ſame ought *eſpecially* to be named; and though there be a Forfeiture of Lands and Goods, yet there is no *corruption* of Blood, nor can there be an *Acceſſory* of this offence, tryed by virtue of this *Statute*; but if there be an Acceſſory upon the Sea to a Piracy, he muſt be tryed by the *Civil Law*.

The *Statute* of 35 *H.* 8. *cap.* 2. taketh not away the *Statute for Treaſons* done upon the Sea, nor is *Clergy* allowable to the Party on the *Statute* 28 *H.* 8. *vide* 14 *Jac. in B. R. Moore* 756. *plac.* 1044. 3 *Inſt.* 112.

Moore 756. *Dy.* 308. But if the Party be attainted before the Admiral, and not before the Commiſſioners, then there is no corruption of Blood or forfeiture of Lands; *quod nota.*

XXVII. Though a Port be *Locus publicus uti pars Oceani*, yet it hath been reſolved more than once, that all Ports, not only the Town, but the Water is *infra corpus Comitatus.*

1 *Inſt.* 391. *vid. poſtea* §. 30.

If a Pirate enters into a Port or Haven of this Kingdom, and a Merchant being at Anchor there, the Pirate aſſaults him and robs him, this is not *Piracy*, becauſe the ſame is not done *ſuper altum Mare*; but this is a down right Robbery at the *Common Law*, for that the Act is *infra corpus Comitatus*, and was inquirable and puniſhable by the *Common Law*, before the *Statute* of 28 *H.* 8. *cap.* 15.

Hide and others robbed the Ship of Captain *Slue*, of the Merchandize of one Mr *Moſs*, a Merchant in *London*; and they were indicted for it at the Common Law, and were found guilty of the ſame, *Anno* 22 *Car.* 2. at the *Old-Baily.*

XXVIII. So if ſuch a *Piracy* or Robbery be made in a *Creek* or *Port*, in ſuch caſes it has been conceived, that *Clergy* is allowable upon the *Statute* of 28 *H.* 8. but if it be done *ſuper altum Mare*, there no *Clergy* is allowable; how-

Moore 756. 1 *Jac. Par.* 1044. And the ſame was ſo ruled

by the opinion of Sir *Lyonel Jenkins*, and the reſt of the Judges, upon the Piracy committed by *Cuſack* and others; and he was executed *Anno* 16-4. *vide* 19 *E.* 3. 124. 9 *H.* 4. 2. *Mo.*756. 1 *Inſt.* 191. *Dy.* 308.

howbeit, if ſuch a Robbery be committed on great Rivers within the Realm, which are look'd upon as common Highways, there perhaps *Clergy* may not be granted; and ſo it was rul'd in the aforeſaid Caſe of *Hyde*, who with a parcel of Men came one Night in a Boat in the River of *Thames*, and under the Colour of Preſs-Maſters, boarded the Ship of one Captain *Slue*, and robb'd her, for which being taken and tried at the *Old-Baily*, by the greater Opinion of the Judges there preſent, 22 *Car.* 2. *Clergy* was denied him. By the Pardon of all Felonies, at the *Common Law*, or by the *Statute-Law*, *Felony ſuper altum Mare* is not pardonable; for though the King may pardon this Offence, yet being no Felony in the eye of the Law of this Realm, but only by the *Civil Law*, the Pardon of all Felonies generally extends not it; for this is a ſpecial Offence, and ought eſpecially to be mentioned.

XXIX. One *Cobham* was arraigned in *Southwark*, before the Commiſſioners of Oyer and Terminer, for a Piracy and Robbery committed on a *Spaniard*, *& ſtetit mutuus & noluit directe reſpondere*: And it being moved by the Attorney-General, whether he ought to have the Judgment of *pain fort & dure* in this Caſe, *Saunders*, Chief Baron, *Brown* and *Dyer* were of Opinion he ſhould, and that by the Words and reaſonable Intendment of the Statute of 28 *H.* 8. *c.* 15. and according to the Opinion *ſupra*, the Judgment was given by *Carus* Serjeant. *Dy.* 241. *pl.* 49.

9 *E.* 4. 28. cited in *Coke's* 3. *Inſtit fol.* 112.

XXX. A Man attainted by virtue of that Statute, forfeits his Lands and Goods, yet there works *no corruption* of blood, by virtue of that Attainder; nor can there be any Acceſſory of Piracy by the Law of this Realm; but if it falls out that there is an Acceſſory upon the Sea, ſuch Acceſſory may be puniſhed by the *Civil Law*, before the Lord *Admiral*, but he cannot be puniſhed by virtue of this Act, becauſe it extends not to Acceſſories, nor makes the Offence Felony.

28 *Eliz. Butler's* Caſe cited 3. *Inſtit. fol.* 113.

XXXI. If one ſteal Goods in one County, and brings them into another, the Party may be indicted in either County; but if one commits Piracy at Sea, and brings the Goods into a County in *England*, yet he cannot be indicted upon the Statute, for that the original taking

was

was not Felony, whereof the *Common Law* took Cognizance.

XXXII. If a Man is taken on ſuſpicion of *Piracy*, and a Bill is preferred againſt him, and the *Jury* find *Ignoramus*; if the Court of *Admiralty* will not diſcharge him, the Court of *King's-Bench* will grant a *Habeas Corpus*, and if there be good Cauſe, diſcharge him, or at leaſt take Bail for him: But if the Court ſuſpects that the Party is guilty, perhaps they may remand him; and therefore in all caſes, where the *Admiralty* legally have an original, or a concurrent Juriſdiction, the Courts above will be well informed before they will meddle.

Marſh's Caſe 13 *Jac. in B. R.* 3 *Bulſtrod. f.* 27.

Treſpaſs for breaking a Ship, and taking away the Sails; the Defendant juſtified by warrant out of the Admiralty, by which he entered the Ship, and took away the Sails. Objection, The breaking is not anſwered, *per Curiam* its good enough, for the entry is a breaking in Law, as *Clauſum fregit*, &c. And that he may carry away the Sails, becauſe this is the manner of their proceedings, and grounded upon Reaſon, becauſe the Ship cannot be kept ſafe, if the Sails be not carried away. *Creamer* againſt *Tokely*. *Latch* 188.

Juſtification in Treſ. by warrant of the Admiralty.

Suit in the Admiralty, the Defendant pleaded the Statute of Limitation; if that Court deny the Plea, Prohibition will be granted, or if they do receive the Plea, but will not give Sentence accordingly, Prohibition will go. *Hardres* 502. *Berkly* and *Morris*.

Statute of Limitation pleadable there.

If a Man be in cuſtody for Piracy, if any aids or aſſiſts him in his Eſcape, though that matter is an Offence at Land, yet the *Admiralty* having Juriſdiction to puniſh the principal, may have likewiſe power to puniſh ſuch an Offender, who is look'd upon *quaſi* an Acceſſory to the Piracy; but to reſcue a Priſoner from an Officer of theirs, they may examine the cauſe, but they cannot proceed criminally againſt the Offender.

Yelverton 134, 135. *Cro. El.* 685. *Cro. Jac.* 269. *Stiles* 171, 340.

The Exemplification of the Sentence of the Court of *Admiralty*, under their Seal, is concluſive Evidence in a Court of *Common Law*. Lord *Raymond*, 893.

XXXIII. Anciently when any Merchants were robbed at Sea, or ſpoiled of their Goods, the King uſually iſſued out *Commiſſions* under the *Great Seal* of *England*, to enquire of ſuch depredations and robberies, and to puniſh the

50 *Eliz.* 3. *par.* 2 *Dorſ.* 24. *de audiend. & terminand. Mercatoribus*

ſuper mare deprædatis. Pat.6.E.1.m. 24. Dorſ. the Caſe of *Will. de Dunſtaple*, a Citizen of *Winton. Pat. 32 E. 1. m. 4. Dorſ. pro Willielmo Perin & Domengo Perez Mercatoribus.*

the parties; and for frauds in Contracts, to give Damages to the Parties, and proceed therein *ſecundum Legem & conſuetudinem Angliæ*, *ſecundum Legem Mercatoriam*, *& Legem Maritimam*; all three Laws included in the *Commiſſions.*

3 *Bulſtrode* 27.

XXXIV. The Courts of *Weſtminſter* have a Sovereign power to enquire after the Liberty of every Man, and that he ſhould not be depriv'd of the ſame without juſt cauſe; and therefore as in other capital Cauſes, ſo likewiſe in this they may ſend their *Habeas Corpus* to remove the Body of any committed upon ſuch an account, and if they ſee a juſt cauſe, they may either bail, or diſcharge, or remand, as the matter ſhall ſeem juſt before them.

Coke 3 *Inſtit. fol.* 113.

* *Seſſ. Admir. Feb.* 18. 1680. Caſe of *Compton Gwyther. & al.*

And altho' the Statute of 28 *H.* 8. *c.* 15. does not alter the offence, or make the offence felony, but leaveth the offence as it was before that Statute, (*viz.*) Felony only by the *Civil Law*, and gives a mean of Trial by the *Common Law*, and inflicted ſuch pains of death as if they had been attainted of any Felony; yet it was reſolved * by all the Judges, and the reſt of the Commiſſioners then preſent, that his Majeſty having granted Letters of Reprizal to Sir *Edmond Turner* and *George Carew*, againſt the Subjects of the *States-General* of the *United Provinces*, and that afterwards that Grant was called in by Proclamation, then mortified in the Treaty of *Breda*, and afterwards ſuperſeded under the Great Seal: That *Carew*, (without *Turner*) having deputed ſeveral to put in Execution the ſaid Commiſſion, who accordingly did; and being indicted for Piracy, the ſame was not a felonious and a piratical Spoliation in them, but a Caption in order to an Adjudication; and though the Authority was deficient, yet not being done by the Captain and his Mariners, *animo deprædandi*, they were acquitted.

CHAP.

CHAP. V.

The Right of the Flag, as to the acknowledging the Dominion of the Britiſh Seas.

I. *Conſiderations general as in reference to the ſame.*
II. *Whether Princes may have an excluſive Property in the Sea.*
III. *That ſuch an excluſive Dominion may be, proved.*
IV. *Of the Sea, whether capable of Diviſion as the Land.*
V. *Conſiderations general, in reference to Maritime Cities touching Sea Dominion.*
VI. *Of the Sea, by reaſon of its inſtability, whether capable of ſubjection.*
VII. *Of the Dominion of the* Britiſh *Sea aſſerted long before, and ever ſince the Conqueſt of this Iſle by the* Romans.
VIII. *The Duty of the* Flag, *but a conſecutive Acknowledgment of that Right. And of the Ordinance of* Haſtings *declaring that Cuſtomary obeiſance.*
IX. *Conſiderations had on ſome Treaties, in reference to aſſerting the Duty of the* Flag.
X. *Of the extent how far that duty is required and payable.*
XI. *Of the duty of the* Flag, *not a bare Honorary Salute, but a Right.*
XII. *Of the importance and value of the ſame, as well in Nations Foreign, as in* England.
XIII. *Of the effects of ſuch a Right and Soveraignty. Of the extent of this Dominion by the Laws of* England.
XIV. *Of the Duty of the* Flag *not regarded as a Civility, but commanded as a Duty.*
XV. *Of the importance of that acknowledgment.*

I. AFter the Writings of the Illuſtrious *Selden*, certainly 'tis impoſſible to find any *Prince* or *Republick*, or ſingle Perſon indued with Reaſon or Senſe, that *doubts* the *Dominion* of the *Britiſh Sea*, to be entirely ſubject to that *Imperial Diadem*; or the *duty* or *right* of the *Flag*, which indeed is but a *conſecutive* Acknowledgment of that ancient *Superiority*: Yet there have not been wanting ſome, who though they have not queſtioned the former, have highly *diſputed* the latter.

But there are ſome fatal Periods amongſt our *Northern Regions*, when the Inhabitants do become ſo brutal and prejudicate, that no obligation of Reaſon, Prudence, Conſcience, or Religion can prevail over their Paſſions, eſpecially if they become the devoted *Mercenaries* of an implacable *Faction* †, in oppoſition to all that can be called

† *Loveſtein.*

led either juſt or honourable; we need not rip up the Carriage of that late inſolent Son of a *Tallow-Chandler*, whoſe Deportments made him no leſs inſupportable at home, than he was amongſt *Foreign Princes*; the teſtimonies of his greateſt Parts and Abilities being no other than Monuments of his *Malice* and *Hatred* to this Nation, and Records of his own *folly*. But Princes are not to be wrangled out of their ancient *Right* and *Regalites* by the ſubtil Arguments of *Wit* and *Sophiſtry*; nor are they to be ſupplanted or overthrown by Malice or Arms, ſo long as God and good Men will aſſiſt, in which his ſacred Majeſty did not want, when he aſſerted his Right with the Blood and Lives of ſo many Thouſands that fell in the diſpute.

II. That Princes may have an *excluſive property in the Sovereignty of the ſeveral parts of the Sea, and in the paſſage, Fiſhing and Shores*, is ſo evidently true by way of fact, as no man that is not deſperately impudent can deny it: the Conſiderations of the general *practice* in all Maritime Countries, the neceſſity of *order* in mutual Commerce, and the *Safety* of mens perſons, goods, and lives, hath taught even the moſt *Barbarous Nations* to know by the Light of *human Reaſon*, that *Laws* are as equally neceſſary for the Government and Preſervation of the Sea, as thoſe that negotiate and trade on the firm Land; and that to make *Laws*, and to give them the *Life* of Execution, muſt of neceſſity require a *ſupream Authority*; for to leave every part of the Sea and Shores to an *arbitrary and promiſcuous Uſe*, without a correcting and ſecuring Power in caſe of wrong or danger, is to make Men in the like Condition with the Fiſhes, where the greater devour and ſwallow the leſs.

III. And though the Sea is as the *Highway*, and common to all; yet it is as other *Highways* by Land or great Rivers are, which though *common* and *free*, are not to be uſurped by private Perſons to their own entire Service, but remain to the uſe of every one: Not that their Freedom is ſuch, as that they ſhould be *without Protection or Government* of ſome Prince or Republick, but rather not *exclude* the ſame; for the true Enſign of Liberty and Freedom is *Protection from thoſe that maintain it in liberty*.

See that Plea of *Chiozzola* for the *Venetian* Sovereignty of the *Adriatick* Sea, at the end of Mr *Selden*.

IV. And

IV. And as the Sea is capable of Protection and Government, ſo is the ſame no leſs than the Land ſubject to be divided amongſt Men, and *appropriated to Cities and Potentates*, which long ſince was ordained of *God* as a thing moſt natural: whence it was that *Ariſtotle* ſaid, *That unto Maritime Cities the Sea is the Territory, becauſe from thence they take their ſuſtenance and defence*; a thing which cannot be, *unleſs part of it* might be *appropriated* in the like manner as the *Land* is, which is divided betwixt Cities and Governments, not by equal Parts, or according to their greatneſs, but according as they *are able to rule, govern, and defend them*; *Berne* is not the greateſt City of *Switzerland*; yet ſhe hath as large a Territory as all the reſt of the Twelve *Cantons* put together: The Cities of *Noremberg* and *Genoa* are very rich and great, yet their Territories hardly exceed their Walls: and *Venice* the Miſtreſs and Queen of the *Mediterranean*, was known for many Years to be without any manner of Poſſeſſion on the firm Land.

V. Again on the Sea, certain Cities of great Force have poſſeſſed large quantities thereof; others of little Force have been contented with the next Waters.

Neither are there wanting Examples of ſuch, as notwithſtanding they are Maritime, yet having fertile Lands lying on the back of them, have been contented *therewith* without ever attempting to *gain any Sea-Dominion*; others who being *awed* by their more mighty Neighbours, have been conſtrained to *forbear* any ſuch attempt; for which two cauſes a City or Republick, though it be *Maritime*, yet it may remain without any *poſſeſſion of the Sea*. God hath inſtituted *Principalities* for the maintenance of Juſtice to the benefit of Mankind; which is neceſſary to be executed as well by Sea as by Land: St *Paul* ſaith, that for this cauſe there were due to Princes, *Cuſtoms and Contributions*.

The ſubſtance of what was alledged by the *Hanſiatique* Towns, at the *Venetians* aſſerting of the Sovereignty of the *Adriatick*, *Inter res communes, uti ipſe Imperator numerat mare, & ideo nemo in mari piſcari, aut navigare prohibetur, & adverſus inhibentem competit actio injuriarum, l. 10. ſi quis in mare, l. injuriarum. ſect. ult. de injuriis. Sin littora quoque communia ſunt l. 2. re diverſ. Quia acceſſorium ſunt maris, & acceſſorium ſequitur naturam Principalis, l. 2. de peculio. legat. c. acceſſorium de reg. jur. in 6. Ad littus maris igitur accedere quivis poteſt, non piſcandi tantum gratia, ſed etiam ædificandi & occupandi cauſa quod in tit. de acquirend. Dom. l. in litt. ff. ne quid in loc. pub. Jo. Angelius J. C. de repub. Hanſiat. par. 6. fol. 85. Edit. Francoſ. An. Dom. 1641.* But theſe arguments were eaſily anſwered by the *Venetian* Lawyers; *Quemadmodum communio littorum reſtringit u*

It

ſtringitur ad populum, à quo occupata ſunt, lib. 3. ſect. littora. D. de quid in loc. pub. Ita etiam communio maris: adeo ut per mare à nemine occupatum navigatio ſit omnino libera: per mare autem occupatum ab aliquo Principe ii liberam habeant navigationem qui ſunt illi Principi ſubjecti; alii verò eatenus, quatenus idem Princeps permittit. Julius Pacius de Dom. maris Adriatici.

It would be a great abſurdity to praiſe the well Government and Defence of the Land, and to condemn that of the *Sea*; nor doth it follow, becauſe of the vaſtneſs of the *Sea*, that it is not poſſible to be governed and protected; but that proceeds from a *defect in Mankind*; for Deſarts, though part of Kingdoms, are impoſſible to be governed and protected, witneſs the many Deſarts in *Africk*, and the immenſe vaſtities of the *New World*.

VI. As it is a gift of God, that a *Land* by the Laws and publick Power be ruled, protected, and governed: ſo the ſame happens to the *Sea*; and thoſe † are deceived by a groſs equivocation, who aver that the *Land*, by reaſon of its *ſtability*, ought to be ſubjected, but not the *Sea*, for being an unconſtant *Element*, no more than *Air*; foraſmuch as they intend by the *Sea* and the *Air* all the parts of the fluid *Elements*, it is a moſt certain thing, that they cannot be brought under *Subjection* and *Government*, becauſe whilſt a Man ſerves himſelf with any one part of them, the other eſcapes out of his *power*; but this chanceth alſo to *Rivers*, which cannot be detained: but when one is ſaid to rule over a *Sea* or *River*, it is underſtood not of the *Element*, but of the *Site* where they are placed: the Waters of the *Adriatick* and *Britiſh Seas* continually run out thereof, and yet it is the ſame *Sea*: as the *Tyber*, *Poe*, *Rhyne*, *Thames*, or *Severn*, are the ſame *Rivers* they were a Thouſand Years ſince; and this is that which is ſubject to Princes by way of *Protection* and *Government*.

† *Grotius mare liberum. Communio parit diſcordiam: quod communiter poſſidetur, vitio naturali negligitur: Habet communio rerum gerendarum, difficultatem Leg. pater. §. dulciſſime Leg. 2.*

Again, it would ſeem ridiculous if any Man would aſſert that the Sea ought to be left without Protection, ſo that any one might do therein well or ill, robbing, ſpoiling, and making it unnavigable, or whatſoever ſhould ſeem fitting in their Eyes; from all which it is apparent, that the *Sea ought to be governed* by thoſe to whom it moſt properly appertains by the Divine Diſpoſition.

VII. When * *Julius Cæſar* firſt undertook the Invaſion of this *Iſle*, he ſummoned the neighbouring *Gauls* to inform him of the *Shores*, *Ports*, *Havens*, and other things convenient

* *Qui omnia fere Gallis erant incognita, neque enim temere*

convenient that might accelerate his intended *Conqueſt*; but from them nothing could be had, they anſwering, All Commerce and Traffick, and viſiting their Ports, was *interdicted to all Nations before licence had*; nor could any but Merchants viſit the ſame, and then had they places † aſſigned them whither they ſhould come; nor was this Dominion that the *Britains* then uſed, commanded without a *Naval Force*; the ſight of which when *Cæſar* ſaw, he preferred them before thoſe of the *Romans*: For upon that occaſion it was that *Cæſar*, having ſeen thoſe *Auxiliary Squadrons*, which the *Britains* ſent the *Gauls* in their Expeditions againſt the *Romans*, took occaſion to find out that Warlike People, whoſe bare Auxiliary Aid ſhook the Flower of the *Roman Squadrons*.

præter mercatores adit ad illos quiſquam, neque eis ipſis quidquam præter oram maritimam atque eas regiones quæ ſunt contra Galliam notum eſt. Com. Gall. Bell. lib. 4 *fol.* 72 *m.* 8.

† *Gauls* Town near *Yarmouth* being then, as is conceived, one of the common places of Mart or Commerce for the *Gauls*. *Quod omnibus fere Galli hoſtibus noſtris inde ſubminiſtrata auxilia intelligebat.*

And when the *Romans* became *Conquerors* of this *Iſle*, the ſame *Right* or *Dominion* was during all their time ſupported and maintained, when they ſailed, round their new atchieved *Conqueſts* in the time of *Domitian*, *Agricola* giving terror to all the neighbouring *Nations*.

Tacit. in vita Agricol.

But when that *Mighty Empire* became ſubject to Fate, and this *Nation* by the continual ſupply of Men, which went out of the Kingdom to fill up the Contingences of the *Roman* Legions, became at laſt ſo enfeebled as to render us a Prey to the *Saxons*; which *Empire* having ſettled Peace with their *Daniſh* Neighbours, and quieted their own home-bred Quarrels; and having reduced the ſeveral petty Kingdoms of their *Heptarchy* under one *Diadem*, they forgot not to aſſume their antient *Right and Dominion of the Seas*; as did the moſt Noble *Edgar* †, who kept no leſs a Number than 400 *Sail of Ships* to vindicate and aſcertain his *Dominion*, giving Protection to the peaceable, and puniſhment to the offenders: nor did his Succeſſors *Ethceldred*, *Canutus*, *Edmond*, and others that followed of the *Daniſh Race*, any ways wave, relinquiſh or loſe that Royalty, but obſequiouſly maintained the ſame down to the *Conqueror*, and from him ſince for upwards of 1200 years in a quiet and peaceable Poſſeſſion.

† *Altitonantis Dei largiflua clementia qui eſt Rex Regum; Ego* Edgarus *Anglorum Baſileus, omniumque regum Inſularum Oceani, quæ Britanniam circumjacent, cum-*

To

Earumque Nationum quæ infra eam includuntur, Imperator & Dominus. Ex Chart. fundam. Eccleſ. Wigor. *Sir* John Burroughs, *fol.* 12. *Idem quoque* Edgarus 400. *Naves congregavit, ex quibus omni anno poſt Feſtum Paſchale* 100. *Naves ad quamlibet Angliæ partem ſtatuit; ſic æſtate Inſulam circumnavigavit: hyeme verò judicia in Provincia exercuit. Ex* Ranulph. Ceſtrenſ. *fol.* 22. *J. B.*

To mention the antient *Commiſſions*, and Exerciſe of this Sovereign Power, *Safe-conduct*, *Writs of Seizure*, *Arreſts*, *Records of Grants*, and *Licences* to paſs through the Sea and to fiſh, *Parliament Rolls* and the like, † would make a Volume; in a word, if *Right of Preſcription*, *ſucceſſion of Inheritance*, *continual Claim*, *matter of Fact*, *conſent of Hiſtory* and *Confeſſions*, even from the Mouths and Pens of *adverſaries*, be of any moment to the aſſerting of a Title, his Sacred Majeſty may be preſumed to have as good a Title to that, as the moſt abſolute Monarch this day on Earth, hath to whatever he can claim or does enjoy. 1 *Rol. Ab.* 528. *pl.* 2.

† So fully proved by Mr *Selden*, that it would be impertinent in this Tract to rehearſe the authorities he vouches. *Vide Jac. Uſſer. Armach. Epiſ. Hiberniæ Sylloge, p.* 121, 163.

VIII. Now the Duty of the Flag is no more but a conſecutive acknowledgment that the *Right* and *Dominion* of the *Britiſh Seas*, (not as a bare *Honorary Salute* or *Ceremony*, but as an *abſolute Sign* of the Right and *Sovereignty* of thoſe *Seas* where they are obliged to ſtrike Sail) are in him to whoſe *Flag* they veil, and pay that duty to; and in ſubſtance is no more but that the King grants a general Licence for Ships to paſs through his Seas, that are his Friends, paying that obeyſance and duty, like thoſe ſervices when Lords grant out Eſtates, reſerving a *Roſe* or *Pepper-Corn*, the value of which is not regarded, but the remembrance and acknowledgment of their *Benefactor's Right* and *Dominion*.

To be paid by Natives as well as Foreigners.

The Duty of the *Flag* or Salutation, is to be paid not only by Foreigners, but alſo by natural born Subjects, and ſuch who refuſe to pay the ſame, may be brought to the *Flag* to anſwer that Contempt.

That this hath been an *Antient Cuſtom*, always waiting on that Sovereignty, appears by that memorable Record upwards of 500 years ſince made, where it is declared by King *John* what the *Antient Cuſtom* was, in theſe Words; **That if a Lieutenant in any Voyage, being ordained by Common Council of the Kingdom, do encounter**

Inter Leg. Marinas ſub fine

encounter upon the Sea any Ships or Veſſels, laden or unladen, that will not ſtrike and veil their Bonnets at the Commandment of the Lieutenant of the King, but will fight againſt them of the Fleet, that if they can be taken, they be reputed as Enemies, and their Ships, Veſſels, and Goods taken and forfeited as the Goods of Enemies, although the Maſters or Poſſeſſors of the ſame would come afterwards, and alledge, that they are the Ships, Veſſels, and Goods of thoſe that are Friends to our Lord the King; and that the common People in the ſame be chaſtiſed by Impriſonment of their Bodies for their Rebellion, by diſcretion.

anni regni Regis Johannis ſecundi. Entitled, *Le Ordinance al Haſtings.*

Thus this *Immemorial Cuſtom* was by that prudent Prince affirmed, the which hath been always before, and ever ſince (without interruption) by all Nations conſtantly paid to the *Ships of War*, bearing the *Royal Standard*, and other of his Majeſty's *Ships*, wearing his *Colours* and *Enſigns of Service*; he knowing that undoubted Maxim of State, *That Kingdoms are preſerved by reputation, which is as well their ſtrongeſt ſupport in Peace, as their chiefeſt ſafety in time of War; when once they grow deſpiſed, they are either ſubject to Foreign Invaſions, or Domeſtick Troubles*, the which (if poſſible) that Prince would have prevented, but he lived when thoſe Celeſtial Bodies, which govern the actions of *Princes*, ſeemed to frown on the moſt Virtuous and Wiſe.

Leon Leſſius de juſtic. & jur. l. 2. c. 2. dub. 19.

IX. And as there is no Nation in the World more tender and jealous of their Honour than the *Engliſh*; ſo none more impatiently tolerate the diminution thereof. Hence it was that in all Treaties, before any thing was aſcertained, the *Dominion of the Seas*, and *ſtriking the Top-ſail* was always firſt provided for.

In the Year 1653. after the *Dutch* had meaſured the length of their Swords with thoſe of this Nation, and being ſenſible of the odds, had by their four *Ambaſſadors* moſt humbly beſought Peace, this very Duty of the *Flag* was demanded by the 15th *Article*, in theſe words:

That the Ships and Veſſels of the ſaid United Provinces, as well Men of War as others, be they in ſingle Ships, or in Fleets, meeting at Sea with

Note, That *Cromwell* was the firſt that ever inſerted any ſuch Ar-

ticle into any Treaty: Our Right and Dominion over the *Britiſh* Sea having never been diſputed before, but by an immemorial preſcription and poſſeſſion tranſmitted to us, and ſuppoſed as unqueſtionable by all Princes.

any of the Ships of this State of England, or in their ſervice, and wearing the Flag, ſhall ſtrike the Flag, and lower their Top-ſail, until they paſſed by; and ſhall likewiſe ſubmit themſelves to be viſited if thereto required, and perform all other reſpects due to the ſaid Commonwealth of England, to whom the Dominion and Sovereignty of the Britiſh Seas belong.

This was ſo peremptorily demanded, that without the *ſolemn acknowledgment of the Sovereignty over the* Britiſh *Seas*, there was no Peace to be had. As to the *acknowledging of the Sovereignty* and the *Flag*, they were willing to continue the *Antient Cuſtom*, but that of *Viſiting* was ſomewhat hard: 'tis true the latter Clauſe was by the *Uſurper* waved, for Reaſons ſtanding with his private Intereſt; but the firſt was (with the addition of theſe words —— in ſuch manner as the ſame hath been formerly obſerved in any times whatſoever) made abſolute by the 13th *Article* between *Him* and that *Republick*, in theſe words: *Item quod Naves & Navigia dictarum Fœderatarum Provinciarum, tam bellica & ad Hoſtium vim propulſandam inſtructa, quàm alia, quæ alicui è Navibus bellicis hujus Reipublicæ in maribus Britannicis obviam dederint, vexillum ſuum è mali vertice detrahent, & ſupremum velum demittent, eo modo, quo ullis retrò temporibus, ſub quocunque anteriori regimine unquam obſervatum fuit*, and from thence it was tranſcribed into the 10th *Article* at *Whitehall*, and afterwards into the 19th *Article* at *Breda*, and from thence into the 6th *Article* made laſt at *Weſtminſter*, and that Clauſe of ſearching of each others Ships made reciprocate, by the 5th *Article* made in the Marine Treaty at *London*; but that extends not to Ships of War, but only to the Ships of Subjects.

Leo ab Aitzma, fol. 847.

Sept. 14. 1662.

Dec. 18. 1674. *S. V.*

X. By the *Britiſh Seas* in the *Article* about the *Flag* are meant the four *Seas*, and not the *Channel* only; for in the 16th *Article* of the Treaty in 1653, they did expreſs what was meant by the *Britiſh Seas* *.

* But now by the laſt treaty at *Weſtminſter* the dominion is aſcertained from Cape *Finiſterre* to the middle Point of the Land *Van Staten* in *Norway* Feb. 9. 167¾.

That

That the Inhabitants and Subjects of the United Provinces may with their Ships and Veſſels furniſhed as Merchant-Men, freely uſe their Navigation, ſail, paſs and repaſs in the Seas of Great-Britain and Ireland, and the Iſles within the ſame, commonly called the Britiſh Seas, without any wrong or injury to be offered them by the Ships or People of this Commonwealth; but on the contrary ſhall be treated with all love and friendly offices, and may likewiſe with their Men of War —— not exceeding ſuch a Number as ſhall be agreed upon — ſail, paſs and repaſs through the ſaid Seas, to and from the Countries and Ports beyond them; but in caſe the ſaid States-General ſhall have occaſion to paſs through the ſaid Seas with a great number of Men of War, they ſhall give three Months notice of their intention to the Commonwealth, and obtain their conſent for the paſſing of ſuch a Fleet, for preventing of jealouſie and miſunderſtanding betwixt the States by means thereof.

Les mers qui entourent les Iſles Britanniques, was the Language propoſed by the *French* Miniſters at the Treaty of *Utrecht*: but the *Britiſh* Miniſters inſiſted on *Maribus Britannicis*; and had it accordingly.

The firſt part of this Article doth plainly ſet out the extent of the *Britiſh Seas*, and that it is not the bare *Channel* alone that comprehends the ſame, but the four *Seas*: and the ſame is further explained in the Great Caſe of *Conſtable*'s, where the *Dominion* of the *Queen* (before the Union) as to the Seas, did extend mid-way between *England* and *Spain*, but entirely between *England* and *France*; the *French* never had any right or claim to the *Britiſh Seas*; for in the Wars between *Edward the Firſt* and *Philip the Fair*, (all commerce on both ſides being agreed to be free, ſo that to all Merchants whatſoever there ſhould be *induciæ*, which were called *ſufferantia Guerræ*, and Judges on both ſides were appointed to take cognizance of all things done againſt theſe *Truces*, and ſhould exerciſe *Judicium ſecundum Legem Mercatoriam & formam ſufferantiæ*) it was contained in the firſt proviſion of that League, that they ſhould defend each others Rights againſt all others; this afterwards occaſioned the introducing that Judgment in the ſame King's time, (before thoſe Judges, choſen by both the ſaid *Princes* by the *Proctors* of the *Prelates*, *Nobility*, and *High Admiral* of

Hill 29 *Eliz. B. R.* the Queen and Sir *John Conſtable*'s Caſe *Leonard* 3. *part.* 72.

Selden de Domi. Maris l. 2. *c.* 14. 27. 28.

Rolls Abridg. 2 *part.* 174.

Coke 4 *Inſtit.* 142.

England, and all the Cities, Towns, and Subjects of *England*, &c. unto which were joined the ſuffrages of the moſt Maritime *Nations*, as *Genoa*, *Catalonia*, *Spain*, *Almain*, *Zealand*, *Holland*, *Friezeland*, *Denmark* and *Norway*, and divers other Subjects of the *Roman Empire*) againſt *Reginer Grimbald*, then *Admiral* of *France*, for that there being Wars between *Philip of France* and *Guy Earl of Flanders*, he had taken Merchants upon thoſe Seas, in their Voyage to *Flanders*, and deſpoiled them of their Goods; whereas the Kings of *England* and their Predeceſſors (as they all jointly do declare and affirm) without all controverſy beyond the memory of Man have had the *Supreme Government of the Engliſh Seas, and the Iſlands thereof.*

1 *Ro. Ab.* 528. pl. 2. *Præſcribendo ſcilicet Leges, Statuta atque interdicta armorum, naviumque alio ac Mercatoriis armamentis inſtructarum, cauſationes exigendo, tutelam præbendo, ubicunque opus eſſet, atque alia conſtituenda quæcunque fuerint neceſſaria ad pacem, jus & æquitatem conſervandam inter omnimodas rates* An univerſal conſent of all Nations. *tam externas quam in Imperio Anglicano comprehenſas quæ per illud tranſierint; ſupremam iiſdem item fuiſſe atque eſſe tutelam; merum mixtum Imperium in juredicendo ſecundum dictas Leges, Statuta, præſcripta & interdicta, aliiſque in rebus quæ ad ſummum Imperium attinent in locis adjudicatis.*

Which memorable Record apparently ſhews, that 4. *Inſtit.* 142. *Selden cap.* 27. *Mare clauſum.* the Kings of *England* have had *iſtud regimen & dominium excluſivè* of the King of *France* bordering upon the ſame Seas, and of all other Kings and Princes whatſoever; and it was there adjudged that *Grimbald*'s Patent was an uſur- Sir *John Burroughs*, *fol.* 42. pation on the King of *England*'s Dominion, and he adjudged to make ſatisfaction, or if he proved unable, then the King his Maſter ſhould, and that after ſatisfaction he be rendred to puniſhment.

And as to the ſecond part of the *Articles* of giving notice, it was but an Act of common Prudence; their late unexpected Viſit, which they then gave, put the *Engliſh* to ſome ſurpriſe; but they facing the *Batavians*, ſoon made them know that they were as capable of beating them *home*, as they were then daring in coming out, and were not to be braved out of a *Dominion* and *Right*, which

which their Anceſtors had with ſo much Glory acquired and aſſerted.

XI. By the *Article* of the Offenſive and Defenſive League between *France* and the *United Provinces*, it was agreed, That if at any time the *Dutch Fleet* (——which were to ſcour the *French Coaſts* in the *Mediterranean* from *Pirates*) ſhould at any time meet the *French*, the *Admiral* of the *Dutch* was to *ſtrike his Flag and lower his Top-ſail* at his firſt approach to the *French Fleet*, and to ſalute the *Admiral* of *France* with Guns, who was to return the ſaid Salute by Guns alſo, *as was uſual when the* Dutch *and* Engliſh *Fleet did meet*.

Anno 1635. *Leo ab Aitzema Hiſt Tract. pacis. Belg. pag.* 177 *Edit. Lugduni Batavor. quarto* 1654.

Only in this the Right of the *Flag* of *England* differs from that claimed by the *French*; for if there had been a failure on the part of the *Dutch*, of paying that reſpect to the *French*, the ſame would have amounted to no more but a breach of the *League*: but the not ſtriking to the King of *England*'s *Flag*, *is open Rebellion*; and the *Article* does ſo ſignify, for it is there mentioned as a *Right* and *Sovereignty*, not a bare *Dominion* only, like that of *Jeruſalem* to the King of *Spain*. 'Tis very true, the refuſing of it is an abſolute annulling of the Treaty; for though in the League with *England* it is mentioned, yet there is nothing of any conceſſion granted by the ſame, but only recognized there as a Fundamental of the Crown and Dignity of the Kings of *England*; nor was the ſame ever ſo much as mentioned in any former Treaty before *Cromwell*'s time, as we have already mentioned, but it was always a Clauſe in the Inſtructions of the *Admiral* and the Commanders under him, That in caſe they met with any Ships whatſoever on the *Britiſh* Seas that refuſed to ſtrike Sail at the Command of the King's *Admiral* or his Lieutenants, that then they ſhould repute them as Enemies (without expecting any declared War) and deſtroy them and their Ships, or otherwiſe ſeize and confiſcate their Ships and Goods; and theſe Inſtructions amongſt others continue to this day. The like are given by the *Venetians* to their Captains in reference to the *Adriatick* Sea, and by ſeveral other Princes.

XII. The Duty of the *Flag* that had been ſo conſtantly paid to our *Anceſtors* is of ſuch advantage to the continuing the Renown of this Nation, that it ſerveth to

print *new Reverence* in *Foreigners* that render it, and adds new Courage to thoſe of our *Seamen* that exact it: and ſince we know how much it imports a State that it be *reverenced abroad*, and that *Repute* is the principal Support of any *Government*, it equally influenceth the Subjects at *Home* and *Foreign Allies* Abroad. And as there is no Nation in the World more tender of their Honour than the *Engliſh*, ſo none more impatiently tolerate the diminution thereof. With what reſentments would not only the more *Generous* and *Noble*, but even the *popular* and *vulgar Seamen* deteſt this or any ſucceeding Age, ſhould they remit or loſe that *Regality*, thoſe Acknowledgments which their Predeceſſors with ſo much Glory aſſerted, and the Neglect whereof was always puniſhed as open *Rebellion*? The indignity of ſuch an Action being ſufficient to enflame the whole Kingdom. The conſideration of which, beſides his Sacred Majeſty's own Royal Inclination to the ſame, and his evident teſtimonies never to abandon a Ceremony of ſo high a concernment; witneſs the expoſing the one half of his own heart, his *Royal Highneſs*, in the aſſerting the ſame, with ſuch *Fleets* and in ſuch *Battles*, that no age or time can ſhew a Memorial of the like; are cauſes ſufficient to create in us new flames of Love to thoſe *Royal Patriots* and Defenders of our *Rights*. *Private Perſons* move in another Sphere, and act by other Rules than *Sovereign Powers*; the regard of Credit with them may oftentimes yield to thoſe of utility or other motives; the *Publick* receives little injury thereby, nor is their Wiſdom queſtion'd for ſuch punctilio's, if they relinquiſh them for other emoluments or peace ſake; but Sovereigns cannot ſo tranſact, their Subjects the People participate in their Honour and Indignities; they have a Property, a direct *Right* in the former *; *Sovereigns* cannot alienate or ſuffer their Honours to be impaired, becauſe it is not *really theirs*, it appertains *to the Nation* univerſally, and they are all effectually injured by ſuch Tranſactions, either becauſe the

It is no policy to attempt the change of old Cuſtoms and Uſages, even errors and abuſes are upon ſuch an account legally tolerated. *In omnibus rebus vetuſtas ipſa plurimum habet dignitatis: ita ut Maſſalienſes quorum præſtantiſſima creditur fuiſſe Reſpublica, laudentur eo nomine quod gladio ad puniendos ſontes uſi ſint eodem à condita Urbe, quo indicarent in minimis quoque rebus antiquæ conſuetudinis momenta ſervanda. Proxime enim ad Deum accedit Antiquitas, æternitatis quadam indagine.* Grot. de Antiq. Reipub. Batav. *in Præfat.*

* *Vide* the Earl of *Shafteſbury*'s Speech to the Parliament, 1672. *Cæteris mortalibus* in

in eo ſtare conſilia, quid ſibi conducere putent: Principum diverſam eſſe ſortem, quibus præcipua rerum ad ſummam dirigenda. Tacit. Annal. *lib.* 4. *Si fama tua videtur neceſſaria, rectam muneris tui adminiſtrationem non poteſt condonare.* Leſſius de Inſt. *l.* 2. *c.* 11. *dub.* 24. §. 26.

the indignity really extends *to them*, or becauſe the *Government* and *Authority* is thereupon *weakned* and prejudiced, which is the greateſt of *Civil detriments* that can befal a People, tho' *ordinarily* they are not aware thereof.

As Prudence doth thus diſtinguiſh betwixt the Demeanor of *private* and *publick* Perſons, ſo doth *Charity* itſelf; for though the *Goſpel* precepts do oblige particular Perſons to bear Injuries and Contumelies with patience, and to ſurrender even the *Coat* as well as the *Cloak*; yet is not this ſo to be conſtrued, as if even private *Chriſtians* were to yield up their *Civil Rights* to every inſolent one that would incroach upon, and uſurp them, or that they were to *deprive* themſelves of thoſe *Reparations*, which the *Law* and *Government* affords them; neither is it ſo to be underſtood as if the *Civil Magiſtrate* in *Chriſtendom* might not ſecure himſelf of that Obedience and Reverence, which is due unto Dignity, but *bear the Sword in vain.*

XIII. This being the *value* which this Nation did always place upon the *Right of the Flag*, the which they never did regard only as a **Civility** and **Reſpect**, but as **a principal Teſtimony of the unqueſtionable Right of this Nation to the Dominion and Superiority of the adjacent Seas**, acknowledged generally by all the Neighbour *States* and *Princes of Europe*, and muſt be paid and acknowledged by all *Princes* in the *World*, that ſhall be, or paſs on the ſame.

The Effects of this *Dominion Univerſal*, or *Sovereignty* which accrue to a *Prince* are theſe:

1. Not only the Regality of the fiſhing for Pearl, Coral, Amber, *&c.* but likewiſe the Advantage of all Fiſh Royal, as Whales, Sturgeon, *&c.* and not only thoſe, but alſo the direction and diſpoſal of all other Fiſh, according as they ſhall ſeem to deſerve the regards of the Publick, as in *Spain*, *Portugal*, &c. is uſed. *Joan. Palatius de Dom. Maris lib.* 1. *c.* 11. 5 *Coke* 107

2. The preſcribing of Laws and Rules for Navigation, not only to his own Subjects, but unto others Strangers, whether they be Princes of equal ſtrength and dignity with himſelf, or any way inferior. Thus the *Romans* did

confine the *Carthaginians* to equip out no Fleets; and forbade *Antiochus* to build any more than twelve Ships of War: and if Tradition informs me right, Queen *Elizabeth* interdicted the then *French* King to build any other or more Ships of War than what they then had, without her leave firſt obtained. The *Athenians* prohibited all *Median* Ships of War to come within their Seas, and preſcrib'd to the *Lacedæmonians* with what manner of Veſſels they ſhould ſail. All Hiſtories are full of ſuch Precedents, which Princes have enacted either upon Agreements enforced upon the Conquered, or Capitulations betwixt them and others (their equals or inferiors) for mutual Conveniences.

Grotius de Jure Belli. l. 2. c. 3. §. 15.

3. The Power of impoſing Cuſtoms, Gabels, and Taxes upon thoſe that navigate in their Seas, or otherwiſe fiſh therein; which they do upon ſeveral rightful Claims, as protecting them from Pirates, and all other Acts of Hoſtilities, or aſſiſting them with Lights and Sea-marks; for which advantages common Equity obligeth thoſe that reap benefit thereby, to repay it with ſome acknowledgment, which ought to be proportioned according to the favour received, and the Expence which the Prince is at to continue it unto them.

Joan. Palatius ubi ſupra. Julius Paucius de Dom. Maris Adriatici.

13 *H.* 3 *fol.* 14. 5 *Coke* 63.

4. As it is incumbent on a Prince duly to execute Juſtice in his Kingdoms by Land, ſo the Sea being his Territory, it is requiſite and a neceſſary effect of his Dominion, that he cauſe Juſtice to be adminiſtred in caſe of Maritime Delinquencies.

5. That in Caſe any Ships navigate in thoſe Seas, they ſhall ſalute his floating Caſtles, the Ships of War, by *lowering the Top-ſail, ſtriking the Flag* (thoſe are the moſt uſual Courſes) in like manner as they do his Forts upon Land; by which ſort of Submiſſions they are put in remembrance, that they are come into a Territory wherein they are to own a Sovereign Power and Juriſdiction, and receive Protection from it.

Theſe are the proper Effects of a real and abſolute Sovereignty over the Seas; which how they are poſſeſſed by the *Venetians*, this enſuing Account will declare.

The Gulph of *Venice* is nothing elſe but a large Bay or Inlet of the Sea, which entring in betwixt two Lands, and ſevering them for many Miles continuance, in the end

end receives a ſtop or interruption of further Paſſage by an oppoſite Shore, which joins both the oppoſite Shores together: It is called the Gulph of *Venice*, from the City of *Venice*, ſituate upon certain broken Iſlands near unto the bottom thereof: it is alſo called the *Adriatick* Sea, from the ancient City *Adria*, lying not far diſtant from the former; from the Entrance thereof unto the Bottom it contains about ſix hundred *Italian* Miles, where it is broadeſt it is an hundred and ſixty Miles over, in others but eighty, and in moſt an hundred. The South-Weſt Shore is bounded with the Provinces of *Puglia* and *Abruzzo* in the Kingdom of *Naples*; the Marquiſate of *Ancona* and *Romagnia* in the Pope's State; and the Marquiſate of *Treviſana* in the *Venetian* State: The North-part of it, or Bottom, hath *Friuli* for its bounds; the North-Eaſt is limited by *Iſtria*, *Dalmatia*, *Albania*, and *Epirus*; whereof *Iſtria* doth not ſo entirely belong to the *Venetians*, but that the Emperor, as Arch-Duke of *Gratz*, doth poſſeſs divers Maritime Towns therein; in *Dalmatia*, ſaving *Zara*, *Spalato* and *Cataro*, they have nothing of importance, the reſt belonging to *Raguſa* and the *Turks*: In *Albania* and *Epirus* they poſſeſs nothing at all, it being entirely the *Turks*; ſo that he who ſhall examine the circuit of the Sea, which muſt contain about twelve hundred Miles, ſhall find the Shores of the *Venetian* Signory, not to take up two hundred of them, omitting ſome ſcattered Towns and diſperſed Iſlands lying on the *Turkiſh* ſide of the *Adriatick* Shore.

'Tis very true of late by the great Conduct and good Fortune of the Generals *Moroſini* and *Coningſmarke*, they have now got *Alba Regalis*, and almoſt the principal parts of the *Morea*.

For the ſecuring hereof from the depredations of Pirates, and the pretences of divers potent Princes, as the Pope, Emperor, King of *Spain*, and the Great *Turk*, who each of them have large Territories, lying thereupon; alſo to cauſe all Ships which navigate the ſame to go to *Venice*, and there to pay Cuſtom and other Duties, the Republick maintains continually in action a great number of Ships, Gallies, and Galliots; whereto alſo they add more, as there may be occaſion, whereof ſome lie about the bottom of the Gulph in *Iſtria*, others about the Iſlands of *Dalmatia*, to clear thoſe parts of Pirates, who have much infeſted thoſe Seas, and others, and thoſe of moſt force, have their ſtation in the Iſland of *Corfu* and *Standia*; in the firſt of which commonly reſides the Cap-

Baptiſta Nani his Hiſtory of *Venice*, *lib.* 11. *fol.* 446, 447, 448.

tain of the *Gulph*, whoſe Office is to ſecure the Navigation of the *Gulph*, not only from the *Corſairs*, but to provide, that neither the Gallies or Ships of the Pope or King of *Spain*, nor Great *Turk* do ſo much as enter the ſame, without permiſſion of the Signiory, and upon ſuch conditions as beſt pleaſe them; which they are ſo careful to effect, that in the Year 1638 the *Turkiſh* Fleet entring the *Gulph* without Licence, was aſſailed by the *Venetian* General, who ſunk divers of their Veſſels, and compelling the reſt to fly into *Valona*, he held them there beſieged, although the ſame City and Port whereon it ſtands, be under the Juriſdiction of the *Grand Signior*; and notwithſtanding that a great and dangerous War was likely to enſue thereupon betwixt the *Grand Signior* and the *Republick*, becauſe the *Venetian* General being not content to have chaſed them into their own Ports, did moreover ſink their Veſſels, and landing his Men ſlew divers of their Mariners, who had eſcaped his fury at Sea; yet after that a very honourable Peace was concluded again betwixt them, wherein amongſt other Things it was agreed, That it ſhould be lawful for the *Venetians*, as often as any *Turkiſh* Veſſels did *without their licence enter the Gulph*, to ſeize upon them by force, if they would not otherwiſe obey: And that it ſhould likewiſe be lawful for them ſo to do, within any Haven, or under any Fort of the *Grand Signior*'s bordering on any part of the *Venetian Gulph*: So jealous hath this Republick been in all times to permit any to ſail the *Gulph*, that in the Year 1630. (as *Palatius* relates) *Mary*, Siſter to the King of *Spain*, being eſpouſed to the Emperor's Son *Ferdinand*, King of *Hungary*, the *Spaniards* deſigned to tranſport her from *Naples* in a Fleet of their own. The *Venetians* ſuſpected that they had an intention hereby to intrench upon, and privily to undermine, by this ſpecious Precedent, that Dominion of the Sea, which the Signiory had continued inviolate *Time out of mind*; and that they took this Opportunity when *Venice* was involved with a War abroad, and infeſted with the Plague at home, and therefore not in a condition to oppoſe their Progreſs. The *Spaniſh* Ambaſſador acquainted the State, that his Maſter's Fleet was to convoy the Queen of *Hungary*, being his Siſter, from *Naples* to *Trieſte*: The Duke replied, That her

De Dom. Maris, *l.* 2. *c.* 6.

Majeſty

Majeſty ſhould not paſs but in the Gallies of the Republick; the *Spaniard* repined thereat, pretending that they were infected with the Plague: The Senate being conſulted, came to this Reſolution, That the Siſter of his Catholick Majeſty ſhould not be tranſported to *Trieſte* any other way, than by embarking in the *Venetian* Gallies, according to the uſual manner of the Gulph; and that, if the Ambaſſador would acquieſce therein, her Majeſty ſhould be attended and uſed with all that reſpect and deference which became her Quality: *but if ſhe proceeded any other way, the Republick would by force aſſert her proper Rights, and attack the* Spaniſh *Navy as if they were declared Enemies, and in hoſtile manner invaded them.* Whereupon the *Spaniard* was compelled to deſire the favour of them to tranſport the Queen in their Gallies, which *Antonio Piſani* did perform with much State and Ceremony; and the Courteſy was acknowledged by ſolemn Thanks from the Courts of the Emperor, and of *Spain.*

XIV. The *Maritime Dominion* by the *Laws* of *England* were always accounted the *Four Seas*; ſuch as are born thereon are not *Aliens*, and to be within them is to be within the *Ligeance* of the *King* and *Realm* of *England.* *Selden Mare Clauſ. l. 2. c. 24. Fitzherb. protection, tit. 46.*

The Records in the days of *Edward the Third* and *Henry the Fifth* proclaim it, that thoſe Kings and their *Progenitors* had ever been *Lords of the Sea*; and amongſt thoſe many great Inſtances of proving the *Sovereignty* of the ſame, is that famous Record of *Edward the Firſt* and *Philip the Fair* of *France*, in which were the *Procurators* of moſt Nations bordering upon the Sea, throughout *Europe*, as the *Genoeſes*, *Catalonians*, *Almaines*, *Zelanders*, *Hollanders*, *Friezelanders*, *Danes*, and *Norwygians*, beſides others under the Dominion of the *Roman German Empire*, where all jointly declare, That the Kings of England, by right of the ſaid Kingdom from time to time, whereof there is no memorial to the contrary, have been in peaceable poſſeſſion of the Sovereign Lordſhip of the Seas of England, and of the Iſles within the ſame, with power of making and eſtabliſhing Laws, Statutes, and Prohibitions of Arms, and of Ships otherwiſe furniſhed than Merchant-Men uſe to be, and of taking ſurety, and affording ſafeguard in all caſes where need ſhall require, and of ordering

Seld. ibid. c. 23. Coke 4. Inſtit. fol. 142.

1 Ro. Ab. 528. pl. 2.

Vide part of the Record.

ordering all things neceſſary for the maintaining of Peace, Right and Equity, among all manner of People, as well of other Dominions as their own, paſſing through the ſaid Seas, and the Sovereign Guard thereof.

And the Caſe 27 *Eliz. in B. R.* Sir *John Conſtable*'s, *Leonard* 3 *par.* 72.

By which it plainly appears, That the Kings of *England* had then been in peaceable poſſeſſion of the ſaid *Dominion* by immemorial Preſcription, that the Sovereignty belongeth unto them, not becauſe they were *Domini utriuſque ripæ*, when they had both *England* and *Normandy*, and were Lords of both Shores; (for *Edward the Firſt* at that time had not *Normandy*) but that it is inſeparably appendant and annexed to the Kingdom of *England*, our Kings being *ſuperiour Lords of the ſaid Seas*, by reaſon (as the very Record mentions) of the ſaid Kingdom; and ſince that the Sovereignty of the Sea did always appertain unto the *Engliſh King*, not in any *other Right than that of the Kingdom of* England; no Prince or Republick ought or can doubt the Title by which our preſent Claim is deduced; 'tis in right of *Britannia*, that the ſame is challenged, 'twas in that right the *Romans* held it.

The reaſon of the opinion there is miſtaken; for the right unto the Sea ariſeth not from the poſſeſſion of the ſhores; for the Sea and Land make diſtinct Territories, and by the laws of *England*, the Land is called the Realm, but the Sea the Dominion; and as the loſs of one Province doth not infer that the Prince muſt reſign up the reſt; ſo the loſs of the Land Territory doth not by Concomitancy argue the loſs of the adjacent Seas. It is no more neceſſary that every Sea-Town ſhould command an hundred Miles at Sea, than that each City ſhould command an hundred Miles by Land. *Julius Paucius de Domin. Maris Adriatici.*

The claim juſtified *Edward the Third* and his *Roſe Noble*, though there are other reaſons regarding the *Lancaſtrian* Line, which yield a Colour for the uſe of *Portcullis* in the *Royal Banners* of *England*; yet as in reference to the *Maritime Dominion*, *Henry* the *Eighth* did embelliſh his *Navy Royal* therewith, and *Queen Elizabeth* ſtamped it upon thoſe *Dollars* which ſhe deſigned for the *Eaſt-India* Trade, ſignifying her power of ſhutting up the Seas, if ſhe thought fit (as by a *Port-cullis*) with the *Navy Royal*; this *Dominion* of the *Britiſh Seas* did authenticate the Proclamation of King *James*, ordaining the *Flemiſh* at *London* and *Edinburgh* to take Licence to fiſh: This juſtified the like Proclamation by King *Charles* I. and warranted

Anno Domini 1600.

Anno Domini 1609.

Anno Domini 1636.

ranted by the *Earl of Northumberland* in his Naval Expedition.

That *Preſcription* is valid againſt the *Claims* of Sovereign Princes cannot be denied, by any who regard the *Holy Scripture*, *Reaſon*, the *practice* and *tranquillity* of the World: and that true it is, the modern *Dutch* have pretended, if not dared, to challenge the Freedom to fiſh in the *Britiſh Seas*, by *Preſcription*; but it is likewiſe as true that *Preſcription* depends not upon the *Corporal* but the *Civil* Poſſeſſion, and that is retained, if *claim* be but made ſo often as to *barr the Preſcription*, the which hath been always made evident; firſt by frequent *Medals*, next by puniſhing thoſe that refuſed it as Rebels, by guarding of it, and laſtly by giving Laws time out of mind on it; which evidently proves that the civil Poſſeſſion is not relinquiſhed; and our Kings conſtantly claiming the Dominion of the ſame, none elſe pretending, all Nations acknowledging it to be in them, and the ſame never queſtioned, 'till thoſe modern *Dutch* (of yeſterday) aroſe.

Will. Fulbeck's Pandects of the Law of Nations, cap. 4.

The King againſt Sir *John Byron. Bridgman, fol.* 23, 24, 25.

XV. The Importance of the Dominion of the Sea unto this Nation, is very great, for on that alone depends our Security, our Wealth, our Glory; from hence it is that *England* hath a Right to all thoſe Advantages and Emoluments, which the *Venetian* Republick draws from the *Adriatick Sea*, where the Ships of the *Grand Signior*, of the *Emperor*, King of *Spain*, and *Pope* pay Cuſtoms, to maintain thoſe *Fleets*, which give Laws to them within the *Gulph*; 'tis hereby that the *Engliſh* can ſhut up or open theſe Seas for Ships or Fleets to paſs or repaſs them; whereto Queen *Elizabeth* had ſo ſpecial a regard, that when the King of *Denmark* and the *Hanſiatick* Towns ſollicited her Majeſty to permit them free paſſage, they tranſporting Corn into *Spain*, ſhe refuſed them; and when a *Proteſtant Fleet of Hamburgers* and others, had preſumed to do ſo, notwithſtanding her Prohibition, ſhe cauſed her *Navy Royal* to ſeize, take, burn, and ſpoil them, when they were paſſed her Maritime Territory, within ſight of *Liſbon*; yielding this reaſon for her juſtification, That they not only relieved her Enemy with Proviſions, but had preſumptuouſly made uſe of her Seas, without obtaining her Royal Permiſſion for ſo doing: 'tis

Vide poſtea in Cap. of Cuſtoms.

June 30. *Anno* 1598.

'tis from hence that the Crown of *England* can juſtly demand an account of any Ship or Ships occurring in thoſe Seas, what their Buſineſs, and what their Intentions are; and prohibit any Prince or Republick to enter there with potent Fleets, without pre-acquainting his Majeſty, and obtaining his Royal Permiſſion; without which Dominion and Sovereignty, *England* can never live ſecure on ſhore; it being eaſy for any Foreign Fleets to amuſe us with ſpecious pretences; and in their paſſage to invade and ſurpriſe us. Thus while the *Turk* pretended to ſail for *Malta*, he occaſionally poſſeſſed himſelf of *Canea*, in the Iſle of *Candia*, and after having taſted the ſweet of that place, never forſook it, till he made himſelf Maſter of the whole. Many ſuch Precedents do occur in Hiſtory: And in fear of ſuch Surprizal, the *Athenians* (being Lords at Sea) did exclude the *Perſian* Monarchs from ſending any Ships of War into any part of the *Ægean*, *Rhodian*, *Carpathian*, and *Lydian* Seas, and that which tends to the *Weſt*, towards *Athens*; the like Caution was uſed by the *Romans* againſt *Antiochus* and the *Carthaginians*; and the *Turk* prohibits all Nations, ſaving his Vaſſals, to enter the *Black Sea* or *Pontus Euxinus*, and alſo the *Red Sea*; and 'tis by virtue and force of this Right that the *Britiſh Nation* can drive on their own Commerce, navigate themſelves, and permit others ſecurely to trade with them. 'Tis true that the *Dutch* have preſumed ſome years ſince, to *violate* the ſecurity of the *Britiſh Seas*, by the attacking the Allies of *England*, not only within the *Britiſh Seas*, but in her *Harbours*, attempting to purſue a *French* Veſſel up almoſt to *London*, and have more than once * attacked the *Spaniſh* Fleets in her Roads, under the protection of her Caſtles, and that againſt the *Laws of Nations*, and the *Peace of Ports*, in which for the time they ſeemed to cloud the *Honour* of the *Nation*; but ſatisfaction for Indignities of that nature, though *ſlow*, yet are *ſure*, and ſhould ſuch as thoſe have been longer tolerated beloved *Britannia* muſt become a proſtitute, by a Confederation of thoſe *States*, or take *Paſs-ports* for her Commerce; but the *Royal Martyr's* Goodneſs was no longer to be trod on, his Heart and his Cauſe were good, and though thoſe unhappy Times (which were crooked to

Selden, *lib.* 1. *cap.* 11.

Alberi Gentil. Hiſp. Advocat. l. 1. *c.* 14. *Vide* Mr Secretary *Cook's* Letter to Sir *Will. Boſwel April* 16. 1635.

* The fight of the *Dutch* with the *Spaniſh* Fleet in the *Downs*, 1639.

Scilicet hoc factum Hollandorum eſt contra juſtitiam omnem pro certo & contra reverentiam quæ partibus

to whatſoever ſeemed ſtraight) did hinder the accompliſhment of his entire intention for *Satisfaction*; yet those whom the juſt *God of Heaven* was pleaſed for a time to permit as a puniſhment to this Nation to rule, did not want in the *fulfilling*; for ſo ſoon as he was pleaſed to ſtay the fury of the *Inteſtine Sword*, their Hearts took *fire* from thoſe *flames* that had formerly been kindled in that *Royal Breaſt*, and having prepared a Fleet, in order to the treating as Soldiers with Swords in their Hands, they were in the like manner aſſaulted in their Territories in the *Downs* (but the *Dutch* found then what it was (though two for one) to aſſault a *Britiſh Lion* at the mouth of his *Den*) intending, if poſſible, to have deſtroyed the *Engliſh Power*, but were fruſtrated in their deſign, being ſeverely beaten home to their own doors; and afterwards thoſe that then had got the *Engliſh* Sword in their hands, begun to conſider that the *Victory* muſt be purſued as a ſeaſon fit to aſſert their *Antient Right* and *Sovereignty* of the Sea, and then thoſe People thinking that the odds before was not enough to deſtroy the *Britiſh Fleet*, they equipt out a Fleet greater and far more numerous than the *Engliſh*, under the *Admirals*, *Van Trump*, *De Wit*, the two *Evertſons* and *Ruyter*; but they ſuffered the ſame Fate as their former, about ſome thirty four of their *Ships* on the Coaſt of *Flanders*, burnt and taken, and the reſt chaſed home to their Ports; and not long after followed the total defeat of their *Naval Forces*, accompanied with the death of *Van Trump* by the *Engliſh*, under the *Admirals*, *Blake* and *Monk*, who had ſunk and fired about thirty more of their *Ships* of *War* (no quarter being given till the end of the Battle) ſix *Captains* and about a thouſand *Men* were taken Priſoners, and about ſix thouſand ſlain. Of their *Preſumptions* ſince (amongſt other things) in denying the Duty of the *Flag*, and what puniſhment and check they have had for the ſame, to what condition they have been reduced, and made to acknowledge *that Dominion and Superiority* to that Crown (under which their *Anceſtors* humbly * beſought the acceptance of the *Sovereignty* of the *Netherlands*, might be annexed and protected) is now freſh in our memories; ſo high and of ſo great Importance is this *Dominion* and *Sovereignty*

& territoriis debetur alienis. Alb. Gent. Hiſp. Advocat. lib. 1. cap. 14.

Anno Domini 1552.

June 2 and 3.

About the 8 of *Aug.* 1653.

* Offered to Queen *Eliz.* *Cette cy entre autres merite bien une conſideration ſpeci-*

vereignty ſignified by the *Duty of the Flag in the Britiſh circumjacent Seas.*

ale, Que la conjunction desdits Pays de Hollande, Zelande, Frieze, & des Villes de l'Eſclux, & Oſtende en Flanders, avec les Royaumes de voſtre Majeſté, *emporte & ſoit l'Empire de la Grande Mer Oceane; & par conſequent une aſſurance &* Felicité *perpetuelle pour les Subjects de voſtre* Sereniſſime Majeſté. *John Stow's* Supplement to *Hollinſhed, An. Dom.* 1585. *Vide* Sir *Walter Ralegh, lib.* 5. *cap.* 2. §. 2. & 3.

CHAP.

CHAP. VI.

Of the Right of Preſſing or Seizing of Ships or Mariners for Publick Service.

I. *That ſuch Right is excepted in the Law of Dominion.*
II. *Whether the Ships of Nations who are in War at the ſame time, may be preſſed, the danger being equal.*
III. *Whether this Right extends to Ships to fight, and no more, or gives a Power to trade.*
IV. *By the Laws of* England *the King may ſeize.*
V. *The reaſon why ſuch a power was veſted in the Admiral.*
VI. *That ſuch a Right of compelling Men to ſerve in Naval Expeditions may be.*
VII. *Objections legal refuted.*
VIII. *Of the antient puniſhment of deſerters of the King's ſervice.*
IX. *Concerning the ſeveral Statutes now in force touching Mariners and Soldiers.*
X. *Whether it be lawful for a private Man to execute Juſtice on ſuch as fly and deſert the ſervice.*
XI. *Where a general Commiſſion is given to Men to execute Juſtice.*
XII. *Several Caſes touching the Admiralty and their Juriſdiction. Ships or Boats found at Sea, Royal Fiſh and Deodands belong to the Admiralty.*

I. THE *Civil Law,* though it can command nothing which the *Law of Nature* forbids, nor forbid what it commands; nevertheleſs it may circumſcribe natural Liberty, and prohibit what was naturally lawful: and alſo by its force *antevert* that very Dominion, which is naturally to be acquired. Hence it is that Princes, by the Law of Nations, may acquire a Right of uſe of things that do belong to private Perſons; for property hath not (as hath been ſaid) ſwallowed up all that *Right,* which roſe from the common ſtate of things; becauſe as all Laws are to be conſtrued as near as poſſible to the intention of the Makers, ſo we muſt conſider what was the mind of thoſe that firſt introduced ſingular Dominions: now the Rules to conſtrue that muſt be near as poſſible to natural equity, and that in extreme neceſſity that old right of uſing things ſhould revive, as if the things had remained common, the ſame ſtanding with the Intereſt of all human Conſtitutions; and therefore in the Law of Dominion

Enta, *aut malo aut neceſſario facinore retenta.* Liv. *lib.* 24.

G

nion extreme Neceſſity ſeems excepted. Hence it is that the Veſſels and Ships of what nature and nation ſoever † that ſhould be found riding in the Ports or Havens of any Prince or State, may be ſeized on, and employed upon any ſervice of that Sovereign that ſhall ſeize the ſame, being but a harmleſs utility, not diveſting the Owners of their Intereſt or Property.

† *F. de Navibus non excuſ. C. l.* 11. *tit.* 3. and *Pekius* on the ſame Law.

II. If a Ship of the King of *Denmark* be in the Port of *London*, and the *Swede* is in War with that Prince; and it happens at that time the King of *Britain* is in War with the *Spaniard*; now the Poſſeſſor is here preſſed with an equal neceſſity, and by the ſame argument is rather obliged to the defence of his own Country than another, whether by the Law of Nations the Ship ought to be detained, hath been doubted; moſt certain it may. Who would not pluck a ſhipwrackt Man from his plank, or a wounded man from his Horſe, rather than ſuffer himſelf to periſh? To ſlight which is a ſin, and to preſerve, the higheſt of wiſdom: beſides, in the taking of the Veſſel the right is not taken from the Owner, but only the uſe, which when the neceſſity is over, there is a condition of reſtoring annexed tacitly to ſuch a ſeizure.

Quidni enim (inquit Cicero) *quando ſine detrimento ſuo poteſt, alteri communicet, in iis quæ ſunt accipienti utilia, danti non moleſta?* 1. *de Offic.* 1.

And doubtleſs the ſame Right remains to ſeize the *Ships of War* of any Nations, as well as thoſe of private intereſt, the which may be employed as occaſion ſhall preſent: So the *Grecians* ſeiz'd * on Ships of all Nations that were in Ports, by the advice of *Xenophon*; but in the time provided food and wages to the Mariners.

* *De Expeditione Cyri.*

III. Whether this Right extends ſo far as to give Princes a power to ſeize in order to traffick may be ſome queſtion; certainly if the Traffick may be for ſuch Commodities, as Maſts, Timber, Tar, Powder, Shot, or other Commodities or Accoutrements of Arms, or Naval Proviſions of offence neceſſary for the defence of the Realm, it may be done (but then it is juſt, *freight* ſhould be paid) for what hurt can it do me to let another have my Boat to paſs over the Ford, if he rewards me? And if that be anſwered, the Owners are at no prejudice, for this is but a harmleſs utility.

10 *Ed.* 3. *m.* 16. 12.

23 *Ed.* 1. *Rott.* 77. in the Exchequer.

IV. By the Laws of *England* there is no queſtion, but the King may ſeize, and it appears by very many antient Records, that he might do it, and it was one of the Articles

12 *E.* 3. in the Black-Book of the Admiralty.

cles of Enquiry amongſt others; Item, ſoit enquis de Nefs, que ſont arreſtees pour le ſervice du Roy, ou pour autre raiſonable cauſe per les Officers du Roy, ou de l'Admiral, & debriſent l'Arreſt, & par les quelles avantdictes Nefs ſont enmenez, & retamer les Mariners qui ſont ordonnez pour le ſervice du Roy; & ſi retracent, & en cas que homme ſoit endite qui la debruſe l'Arreſt en ſa Nef arreſtee pour le ſervice du Roy, & de ce ſoit convicte par xii. il perdra ſa Nef ſi'l na grace du Roy ou du hault Admiral, & pour ce quil a eſte pluſieurs fois debatu en Angleterre pour les arreſtes des Nefs, quant le Roy amande Sergeants d'Arms, ou autre Miniſtres pour arreſter Nefs al oeps du Roy, & les Seigneurs des Nefs ſont venus devant l'Admiral, & alleguent que leurs Nefs neſtoient mye arreſtees, ordonne eſtoit au temps du Roy Richard le Primier a Grimſby per advis de pluſieurs Seigneurs du Royalme, que quant Nefs seront arreſtees pour ſervice du Roi, que le Roy eſcripta par ſes Lettres Patentes a l'Admiral d'arreſter leſs Nefs plus ou moins a la voulonte du Roy, & ſelon ce quil a beſoin, & l'Admiral eſcripra au Roy ou au Chancelier d'Angleterre les noms des Nefs ainſi arreſtees aſſemblement avec les noms des Seigneurs & Maiſtres d'icelles, & en tel cas le Seigneur de la Nef ne la Maiſtre ne viendront pas a dire que la Nef neſtoit mye arreſtee ne a ce ne seront oyz, and that upon ſuch Arreſts broken, the Parties might be puniſhed and fined. P. 26. and 27. 6. *Joh. m.* 11. 9 *Joh. m.* 3. 24 *E.* 2. *m.* 17. 11 *R.* 2. *m.* 13. *Rott. Franc.*

Again, *Inquiratur ſi arreſtatus, ad ſerviendum Regi fregit arreſtum, hujuſmodi tranſgreſſor ſtat in gratia Regia ſive Admiralli ſui utrum voluerint committere Carceribus mancipandum vel finem facere, in hac parte ſi arreſtum hujuſmodi factum manifeſtum fuerit cognitum.* *De Offic. Admiral. Angliæ per Roughton, Artic.* 10.

If the *Admiral* by the King's Command arreſts any Ships for the King's Service, and he or his Lieutenant return and certify the Arreſt, or a Liſt of the Ships arreſted into *Chancery*, no Maſter or Owner of the Ships ſo arreſted ſhall be received to plead againſt the Return, pur ceo que l'Admiral & ſon Lieutenant ſont de record. The Black-Book of the Admiralty, *fol.* 28, 29. & 157, 158. 15 *R.* 2. *c.* 3.

Item, *Inquirendum de omnibus Navibus quæ ad ſerviendum Domino Regi ſuper mari arreſtatæ fuerint, & poſtea*

Domini, poſſeſſores, ſive Magiſtri dolo & fraude à ſervitio hujuſmodi ſe ſubtraxerunt in deceptionem Domini Regis, qui ſi inde poſtea indictati fuerint, & convicti ſuper hoc, naves ſuæ Domino Regi forisfactæ per ordinationem Domini Regis Richard Primi; *& ſi Domini, Poſſeſſores, vel Magiſtri hujuſmodi inde coram Domino Rege & Cancellario ſuo per aliquas allegationes ſe aut naves hujuſmodi excuſare voluerint, ſi Admirallus vel locum tenentes ſui per Literas ſuas Patentes de arreſto hujuſmodi facto fidem fecerint pleniorem, Domini, Poſſeſſores, aut Magiſtri prædicti nullo modo audiri debeant, ſeu eis fides quovis modo adhiberi, eo quod Admirallus & locum tenentes ſui ſunt de recordo.*

Croke's Arg. in *Hampden's* Caſe, *fol.* 79. to 100. *Vide* State Trials, Vol. I.

And if the Ship ſo arreſted break the Arreſt, and the Maſter or Owner thereof be indicted and convicted **devant l'Admiral** by the Oath of twelve men, the Ship ſhall be confiſcate to the King, which power the *General* maintains in all places where he has power, and the ſame ſeems to be provided for in the latter *Clauſe of* 15 *R.* 2. *Ca.* 3.

Spelmanni Concil. 520, 521.

IV. By King **Ethelred**, his *Biſhops* and *Nobles* in the General *Council* of **Enham**, *Anno* 1009. for the ſetting out a Fleet every Year, and the puniſhment of thoſe who hurt or ſpoiled any Ship, or deſerted the Service, eſpecially if the King was preſent in the Expedition, amongſt others it was enacted, *Si quis Navem in Reipub. Expeditionem deſignatam vitiaverit, damnum integre reſtituito & Pacem Regis violatam compenſato; ſi verò ita prorſus corruperit, ut deinceps nihili habeatur, plenam luito injuriam & læſam præterea Majeſtatem.* So Sir *Henry Spelman*'s Verſion out of the *Saxon* Copy renders it, but the antient Copy hath it more largely.

Spelman. 528. *expeditio Navalis.*

Naves per ſingulos annos ob patriæ defenſionem & munitionem præparentur, poſtque Sacroſanctum Paſcha cum cunctis utenſilibus competentibus ſimul congregentur; qua igitur etiam pœna digni ſunt, qui Navium detrimentum in aliquibus perficiunt? Notum eſſe cupimus, quicunque aliquam ex Navibus per quampiam inertiam vel incuriam, vel negligentiam corruperit; & tamen recuperabilis ſit; is Navis corruptelam vel fracturam ejuſdem per ſolidam prius recuperit, Regique deinde, ea quæ pro ejuſdem munitionis fractura ſibimet pertinent, rite perſolvat.

Moſt

Moſt certain it is, that the Kings of *England* have in all Ages, by their *Writs* and *Patents*, commanded not only the *Admiral*, but the *Wardens* of the *Cinque-Ports* and others, to arreſt and provide Ships of War, and other Veſſels, and impreſs and provide Maſters of Ships, Seamen, Mariners, and all other neceſſary Tackle, Arms, and Proviſions for Ships, for the defence of the Sea and the Realm againſt foreign Enemies, or for tranſporting of Armies paying their Freight (if not bound thereto by tenure) as well as to elect and provide all ſorts of Soldiers, Carpenters, and other Officers to be aſſiſtants in their ſeveral Expeditions.

Rot. Scotiæ 10. *E.* 3. *m.* 2. to 17. and then to 34. *intus & dorſ.* to 28.

But Fiſhermen or Mariners preſſed for the Service, are not to be employed as Soldiers, but only as Mariners; unleſs it be in caſes of great neceſſity, or bound thereunto by Tenure, Cuſtom, or Covenant.

1 *Eliz. cap.* 13. *Vide* 16. 17. *Car.* 1. *c.* 5.

V. The reaſon why the *Admirals* had ſuch power given them, was becauſe they being ſometimes called *Capitanei*, and *Gubernatores Flotarum*, they had the ordering and governing of the Ships of War, and the raiſing and fitting up ſuch Ships for the Navies, as they thought fit; other times called *Cuſtodes Maritimarum partium*, their duty being to provide all Naval Proviſions, as well to ſupply the King's Navies occaſions, as to gratify any other of the King's Friends, when diſtreſs ſhould conſtrain them to touch in his Ports, that his Subjects might receive the like retaliation again; they were called *Capitanei Nautarum & Marinellorum*, as in reference to the deciding all differences amongſt thoſe in the King's Service, and puniſhing of ſuch as tranſgreſſed; and as the place was great, ſo the power was large, eſpecially in all things belonging to the *Navy-Royal*; in which they had the ſupreme rule and government in all things belonging to it. He ſate formerly in the King's Houſe, and there kept his Court, as the *French Admirals* do at this day at the *Marble-Table*, in the King's Houſe at *Paris*.

Court of Admiralty erected by *Ed.* 3.

Spelman's Gloſſ. *in tit. Admir.* Lambert *Archeion tit. Admiral.*

VI. And although there ſeems no queſtion but the King may preſs Ships, yet there have been thoſe who ſeem to doubt, if not to queſtion, whether he may preſs Men to ſerve; for my own part I think he may, my Reaſons are theſe; It is lawful for every Man to addict and yield up

himſelf to whom he pleaſeth, as appears both out of the *Hebrew* Law and *Roman* Law; why then may not any People, being at their own diſpoſe, give up themſelves to their Prince or Sovereign, ſo as to transfer the right of commanding their aid and help, as often as need ſhall require (it is not here inquired what may be preſumed in a doubtful caſe, but what may be done in point of right) moſt certain ſuch a power may well be, and that grounded on great Reaſon; as if the Commonwealth ſhould happen to be invaded by ſuch a one as ſeeks not only the ſubverſion of the Government, but the deſtruction of the People, and they can find no other way to preſerve themſelves, but that the ſupreme Power ſhould be veſted with ſuch a Prerogative, as to enforce or preſs the Inhabitants to ſerve in Arms in the Defence of the ſame, and the contempt of which to puniſh; or if they ſhould be be oppreſſed with want, and that ſupplies of Proviſions can no ways be had, but by compelling another by force to exhibit the common Offices of humanity to a Nation in whoſe Territories a Famine rages, that the Inhabitants ſhould on ſuch extraordinary Occaſions be compelled by force to ſerve in Arms.

Exodus 21. 6. *Inſt. de Jure perſon.* § *Servi autem.* *Gell.* l. 2. c. 7.

And this Dominion may be obtained ſeveral ways, either by a voluntary Reſignation to a Conqueror, as they of *Capua* to the *Romans*, *Our Land*, *the Temples of our Gods*, *all Divine and Humane things we yield up unto your hands*, *O ye Conſcript Fathers*. Again, Freedom may be granted to all by a Conqueror, except Mariners, which ſhould in Caſes of neceſſity be excepted; or that ſome Prince, who will not ſuffer any Mariner to go out of his Dominions, without ſubjecting themſelves to ſuch a reaſonable command, beſides the Majority of Nations on ſuch grounds may abdicate from a part of them the entire Freedom of that Member.

Tacitus.

Nor are there examples of this kind wanting; the *Germans* are every one Maſter of his own Houſe, but are almoſt on every occaſion ſubject to their *Lords*, eſpecially in their Goods. The *Iriſh Coſherers*, which were reprendinations, when the *Chief Lord* and his Retinue came to his Tenant's Houſe, they fed upon his Proviſions till they were ſpent, all being ſolely at their Devotion. And as to the

Coke 2. *Inſtit. fol.* 358.

the Sea, the King of *Britain* may at this day reſtrain Merchants or Mariners to paſs out of the Realm, without Licence; and the various tenures that are introduced, which is preſumed were ſince the *Conqueſt*, were no other but the Will of the *Conqueror*; for the right is not meaſured by the excellency of this or that form, but by the Will.

2. E. 1. Memb. 18. Rott. Pat. 2. E. 1. m. 17. Rot. fin. 31. E. 1. num. 44. Ro. Pat. 17. H. 6. Ro. Cla. in dorſ.

As to the impreſſing of Seamen, it is ſtrange that its Lawfulneſs ſhould ever be called in Queſtion by any Perſon, who has read our Hiſtory, or our Statute-Book. The Crown has been in Poſſeſſion of it from Time immemorial: And if a new Race of People were this Day to ſpring out of the Earth to poſſeſs this Iſland; if we may at the ſame Time ſuppoſe them to unite under one Civil Polity, and to be conuſant of the Neceſſity of Naval Strength for their Defence; the Power of impreſſing them for the Sea-Service would be implied in the executive Part of their Government, let it's Conſtitution be what it might; *viz.* limited Monarchy, Ariſtocracy, or Democracy, or any compound of them, or ſome of them. But, as was hinted above, our Legiſlature has frequently maintained this Power, as undoubted Law. See 2. *Ann. ch.* 6. concerning Protections to be granted to Apprentices to be bound to the Sea-Service. But more explicite is a former Statute, *viz.* 2. and 3. *P. & M. ch.* 16. by which Watermen on the *Thames* who abſcond in Preſſing-Time, and then return to row, are made liable to Impriſonment for two Weeks, and to be baniſhed to row upon the River by the Space of a Year and a Day. See alſo 2. *R.* 2. *ch.* 4. and 5. *Eliz. ch.* 5. *ſect.* 41, 43.

Vide the Caſe of *Bates*, in *Lane*'s Reports, *fol.* 4. *Vide ſupra Sec.* 4. *ad finem.*

VII. And though it hath been conceived by ſome, that the King cannot preſs Men to ſerve in his Wars, giving their Reaſon, that of old he was to be ſerved either by thoſe that held by tenure, thoſe that covenanted by Indenture to provide Men, or thoſe who contracted with the King's Officers for Wages and entered into Pay, or thoſe that were in Priſon for the King's Debts; but that only extended to thoſe Wars that were by Land: not one word in all thoſe Acts, or Muſter *Rolls*, relating in the leaſt to Mariners; and yet what vaſt Fleets were in thoſe Days? But on the other Hand it hath been always

1 Inſt. 71.

accuſtomed to preſs ſuch ſort of Men for the Naval Expeditions. The ancient Records that mention ſuch Perſons ſubject to be preſs'd by Law is that of 29 *E.* 3. commonly called * *The Inquiſition of Queenborough*, wherein it was expreſsly in charge amongſt others, to enquire of thoſe Mariners that were preſſed for the King's Service, and deſerted the ſame: So likewiſe by thoſe other Articles tranſlated by *Roughton*, it is in expreſs charge to the *Jury* to preſent thoſe that being preſt to ſerve brake the King's Arreſt, in order to their Puniſhment; and in thoſe days it was eſteemed an high offence: and the Oath which the *Jury* then took being impanelled, was this:

* 2. *Apr.* 49 *E.* 3. in the Black Book of the *Admiralty*, 32, 33, 34. *Art.* and *fol.* 62. *Art.* 10.

This here ſee my Lord the Admiral, that I Jonathan Naſh ſhall well and truly enquire for our Lord the King, and well and truly at this time then ſerve at this Court of th' Admiralty, preſent as moch, as I have acknowlech, or may have by Information of eny of my Fellows, of all maner Articles or Circumſtances that touchen the Court of the Admirate and Law of the Sea, the which ſhall be grate to me at this time, and thereupon ſworn or charged, and of all other that may renew in my mind, and in ſhall for nothing lette, that is for to ſay, for Franchiſe, Lordſhip, Kinreden, Allience, Friendſhip, Love, Hatred, Envy, Enemitee, for dred of loſt of Goodnee, for non other caſe that I ſhall ſoe doe, the King's Counſeils, my fellows, mine own, will and truly hele without fraud or malengyn, ſo God me help at the holy dome, and by th's Book.

The Black Book of the Admiralty, *fol.* 17.

VIII. And as the enquiry was ſtrict, ſo was the puniſhment very great: *Item, qui fugiet à Domino vel ſocio ſuo pro timiditate belli vel mortis in conductione Heretochii ſui in expeditione navali vel terreſtri, perdat omne quod ſuum eſt, & ſuam ipſius vitam, manus mittat Dominus ad terram quam ei antea dederat.*

Lamb. *inter Leg. Edovardi* 139.

13 *Car.* 2. *cap.* 9. Ar. 17.

IX. In the Service of the King two ſorts of perſons were always capacitated to attend the *Navy-Royal* in their Expeditions, the one a Salt-water Land-Soldier, the other a compleat Mariner or Sailer: It was a doubt, whether ſuch a Soldier, departing from the Service, were ſubject to any other puniſhment than that of *Martial Law*, which can at no time be executed in *England*, but when the King's Standard is in the Field; thereupon it was provided, *That*

if

if any Soldier being no Captain immediately retained with the King, which ſhall be in wages and retained, or take any preſt to ſerve the King upon the Sea, or upon the Land beyond the Sea, depart out of the King's ſervice without licence of his Captain, that ſuch departing be taken, deemed, and adjudged Felony. And that all the Juſtices in every Shire of England, *where any ſuch Offender be taken, have power to enquire of the ſaid offences, and the ſame to bear and determine as they do and may do of Felony,* &c. *expreſſed in the King's Commiſſion to them made, as though the ſame offences were done in the ſame Shire. And alſo that the departing of ſuch Soldiers, and alſo their Retainers, if it be traverſed, be tried in the ſame Shire where they are for ſuch a Cauſe arreſted and arraigned.* The Juſtices have here a concurrent power to enquire and try, but it does not ſhut out the Sovereign Courts, or hinder but the King may try them upon a Commiſſion of Oyer and Terminer, or Goal-delivery. It was a doubt conceived by ſome of the late Judges, if a Man had run from his Colours at *Plymouth*, and afterwards was taken in *Middleſex*, and committed to *Newgate*, whether after a Bill is found in *Middleſex*, the Juſtices of Goal-delivery for *Newgate* could try him; but it was ruled more than once by the greater number of the Judges, they might; and ſo have the Precedents been always ſince the making of this Statute, and upon the like Reaſon, that a Man that takes a ſecond Wife, hath by the Statute the ſame directions to be tried in the ſame Shire where he is taken; yet if taken in *Middleſex*, was always tried at the *Old-Baily* in *London*.

7 H. 7 cap. 1. §. 2. Cro. Car. 71.

3 H. 8. cap. 5. §. 2.

Theſe Statutes were made, becauſe the Statute of 18 *H.* 6 *cap.* 19. was looked upon not to be ſufficient, for that Act had reference only to the ancient Tenures, and thoſe that covenanted with the King to provide Soldiers; whereupon a queſtion afterwards ariſing, whether ſeveral who having then taken preſt Money to ſerve the *Queen* againſt the Rebels in *Ireland*, and had departed and withdrawn themſelves from the Service, ſhould be within thoſe Statutes, in regard ſome doubt ſeemed to ariſe on the ſame; but it was reſolved by all the Judges of *England*, that thoſe two Statutes of 7 *H.* 7. *Cap.* 1. and 3 *H.* 8. *Cap.* 5. are all one in effect, and were perpetual Acts: the great doubt and queſtion, whether the Statute of 18 *H.* 6. *Cap.*

43 *Eliz.*

Coke 6. *part. fol.* 27.

Raſtal doubted in his Abridgment.

Cap. 19. did extend to Mariners and Gunners ſerving on the Seas, and taking Wages of the King, was in Parliament not long before cleared in theſe Words: *That the ſaid Statute made in the eighteenth Year of the Reign of* H. 6. *in all pains, forfeitures, and other things, did, doth, and hereafter ſhall extend as well to all and every Mariner and Gunner, having taken, or who hereafter ſhall take preſt or wages to ſerve the Queen's Majeſty, her Heirs and Succeſſors, to all intents and purpoſes, as the ſame did, or doth unto Soldiers, any diverſities of opinion, doubt, matter, or thing to the contrary thereof notwithſtanding*: But now Mariners deſerting the Sea-ſervice are particularly within the Proviſion of 13 *Car.* 2. *Cap.* 9. which hath made the Offence Death; but the Trial is by a *Court Martial.*

Article 17.

And Land-Soldiers, though in Time of Peace, are likewiſe within the Statute of 7 *Hen.* 7. *Cap.* 1. and 3 *Hen.* 8. *Cap.* 5. if they take any preſt Money to ſerve the King upon the Sea, or upon the Land, or beyond the Sea, and ſhall deſert the Service; but that is inquirable according to the Courſe of the *Common-Law*, where if the party ſhall depart without Licence, he ſhall ſuffer Death, without benefit of the Clergy.

X. If ſuch Perſons ſhall ſo deſert the Service, it hath been a Queſtion, whether a private Perſon, under the ſame obedience meeting with ſuch a Deſerter, might not put him to death; it hath been conceived that he might, and the act is lawful, and the party that ſlays him hath a true Right before God, as impunity before Men: But that is to be underſtood partly by the Words, and partly by the Letter of the Law: For if the Law gives indulgence to Paſſion, it takes away human Puniſhment, and not the Fault; as in caſe an Husband kills an Adulterous Wife or the Adulterer * in the Act; moſt certain it is a Provocation in the higheſt nature, and will juſtify the Slayer: But if the Law reſpect the Danger of future Evil, by delay of Puniſhment, it is conceived to grant right and publick power to a private Man: ſo that he is not then in the capacity of a private Man.

Non ſolis ducibus aliiſque potentibus innaſci ſolet, atque immorari bene agendi propoſitum, ſed cuique volenti & licet & honeſtum eſt ejus qua vivit Reipublicæ malis commoveri, & publicas utilitates pro ſuis viribus promovere. Vide Grotium *l.* 2. *c.* 10.

* That is as to entitle him to *Clergy*, and ſo it was rul'd by all the Judges in *B. R. M.* 23 *Car.* 2. in the Caſe of one —— found ſpecially at *Surrey* Aſſizes before Mr Juſtice *Twiſden*, who ſlew the Adulterer in the very Act. *Vide* Auguſt. *de Civit. Dei citatum.* C. *quicunque cauſa.* 23. *qu.* 8.

And

And upon that very Reaſon Queen *Elizabeth* denied the conſtituting of a *Conſtable*, for the Trial of Sir *Francis Drake*, who ſtruck off the Head of *Doughty*, *in partibus tranſmarinis*. *An.* 25 *Eliz.* *Co. Litt.* 74. *b.*

XI. Hence it is that every Man hath a Licence given him to oppoſe force againſt plundering, and pillaging Soldiers: and the next the ſubſequent Law about Deſerters ſaith, *Let all men know they have a power given them againſt publick Robbers and Deſerters that run from their Colours, and all are Miniſters of Revenge, for the quiet of all*; to this purpoſe is that of *Tertullian*, *againſt Traytors or publick Enemies every Man is a Soldier*: And herein differs the right of killing of Exiles and Outlaws, or thoſe whom they call *Banditoes*, from thoſe kind of Laws; becauſe there proceeds a ſpecial Sentence, the Judgment of Baniſhment or Outlawry being promulgated; but here a general Edict, the Fact being evident, obtains the force of a Judgment or Sentence pronounced: the Judgment of the latter muſt be according to the *Civil Law*, which yet remains ſtill in force, as to the Trial of ſuch Deſerters; which Impunity for ſuch killing ſeems allowed of at this day by that Law. *Cod. Juſtin. tit. quando liceat unicuique.* It was in force in *England* till the beginning of the Reign of *Ed.* 3. *Co. Litt.* 128. *b.* 12 *H.* 4. *f.* 4, 5. 37 *H.* 6. *fol.* 3. *Mir. c.* 4. §. 4.

XII. Caſes relating to the Juriſdiction of the Admiralty as to Matters ſueable there, or at the Common Law.

The Trial ſhall be where the Original Contract is made, which if in *England*, tho' the ſubſequent Matter to be done be upon the Sea, the Trial ſhall be at the *Common Law*. But if the contract, and what is to be done all of it is beyond Sea, it cannot be tried at Law here, but in the *Admiralty*; but if part be to be done here and part beyond Sea, ſo as it is mixed, then it ſhall be tried at Law. As an Action upon the Caſe upon a Policy of Aſſurance made at *London*, that a Ship ſhall ſail from *Melcomb Regis* in the County of *Dorſet* to *Abville* in *France*, ſafely, *&c.* And the Plaintiff declared that the Ship in ſailing towards *Abville*, *viz.* in the River of *Soame* in *France*, was arreſted by the King of *France*, &c. and the Iſſue was whether the Ship was ſo arreſted or not; the Trial was by *Niſi Prius* in *London*, and reſolved to be well brought, though 'twas objected that this Iſſue ariſing merely from a Place out of the Realm, could not be tried at Law, for the Aſſumpſit being at *London* was the ground and foundation *Tryal where the Original Contract ariſes.*

of

of the Action, and therefore ſhall be tried here, for otherwiſe it could not be tried at all. Cited in *Dowdale's Caſe* 6 *Rep.* 47. *b. Godbolt* 76. and 204.

And ſo if the Contract be made at Land, tho' beyond Sea, the Trial ſhall be at Law, tho' what is to be done, be all of it beyond Sea, by laying the Contract made at a Place in *England*, as in *Bourdeaux apud Iſlington in Com. Middleſex.* So is the Caſe of *Slaney* and *Clobery* againſt *Cotton*, where the Plantiff ſued the Defendant in the *Admiralty* Court upon a Promiſe made in *Barbary*, to ſail from *Sirborona* in *Barbary* to *Ricumpta* in *Brazil*, &c. upon ſuggeſtion that the Contract was made in *London*; Prohibition was granted: for, by *Jones*, the performance of the conſideration does not give the Action without the Contract, and this was made at Land, tho' beyond the Seas, which may be ſuppoſed to be done in a place in *England*. 2. *Rolls Rep.* 486. See *Tucker* and *Caff*'s Caſe in the ſame Book 492. and 497. and 2 *Brow.* 10. 11.

Matters beyond Sea not triable in an inferior Court.

A Contract was made at *Newcaſtle* that a Ship ſhould ſail from *Yarmouth* to *Amſterdam*, Debt was brought upon this Contract, in the Court of *Newcaſtle*; adjudged, that the Action would not lie there, being a limitted Juriſdiction, which ſhall not have conuſance of any matters done in *partibus tranſmarinis*, but only the Courts at *Weſtminſter*, *March*'s *Rep.* 3.

Præmunire for ſuing in the Admiralty.

If one libel in the Court of Admiralty for a thing done upon the Land, and it appeareth upon the Libel, that the thing was done upon the Land, and they notwithſtanding that hold Plea of it, a *Præmunire* lyeth upon it; but if the ſame do not appear within the Libel, then it is not within the 13 of *R.* 2. *c.* 5. and 15 of *R.* 2. *c.* 3. but a Prohibition ſhall only iſſue, 2 *Leon.* 183.

Admiralty hath Juriſdiction of *Flotzam*.

The Admiralty hath Juriſdiction of *Flotzam. Treſilian* againſt *Jones* 2. *Keeble* 361.

Superſedeas to the Admiralty.

A *Dutch* Ship was broken by a great Tempeſt in a Creek of the Sea, *Infra Corpus Comitatus de Dorſet*; the Sailors upon pretence that the Goods in the Ship were *bona peritura*, procured a Commiſſion of Sale out of the Admiralty-Court to ſell them; and the true Owners to prevent ſuch Sale, brought a *Superſedeas*; and upon ſhewing the Libel to the Court, a Prohibition was granted. (1.) Becauſe the Cauſe of Action accrued *infra Corpus*

Comitatus. (2.) Becauſe the Sale of the Goods was good, as *bona peritura*. *Culmer* againſt *Brand*. 2 *Sid*. 81.

One having taken a Ship as Prize which had *bona peritura* entred into a Recognizance with ſureties before the Judges delegate to bring the Money raiſed by Sale of the Goods in the Admiralty-Court before ſuch a day, if they upon a Plaint there depending did not adjudge the Ship and Goods to be lawful Prize, which they adjudged lawful Prize; and after at another time cited the Owner before the Judges of the Admiralty, and for his not coming and bringing the Money at the day, they threatned to ſue Execution againſt the Bail or Sureties who were Merchants of *London*, Prohibition was prayed; for by their firſt Judgment or Sentence, their Recognizance was diſcharged, and they ought not by Colour of this to endanger the Credit of Men of Reputation; but the Court would not grant a Prohibition, for they ſaid an unjuſt Sentence of the Admiralty, in a Cauſe of which they have Original Conuſance, is not a Cauſe of Prohibition. As if Tythes which in verity are paid, are found not paid in the Spiritual Court, yet a Prohibition lies not, and here the Judges Delegate have ſole Power upon this Recognizance, to make Execution or defeat it.

Unjuſt Sentence in the Admiralty where they have original Conuſance is no Cauſe for a Prohibition.

2 *Sid*. 152. *Beck*, v. *Chelſcoke*.

The Corporation of *Trinity-Houſe*, under pretence of Letters Patents from Queen *Elizabeth* for the ballaſting of all Ships within the Bridge of *London* and the Sea, and that no Ship ſhould take Ballaſt of any other but of them, ſued one *Boreman* (a *Dutch* Man) in the Admiralty for taking Ballaſt of another, within the Place aforeſaid. *Per Curiam* the Place being alledged to be at *Ratcliffe*, a Prohibition was granted; reſolved that the Letters Patents were void, for that thereby a Charge is raiſed upon the ſubject for the private gain of the Houſe, for they would not ballaſt a Ship under 2 *d*. *per* Ton.

Suit there for not ballaſting a Ship.

2 *Brownl*. 13.

In the Caſe of Sir *Richard Hawkins*, Vice-Admiral of the County of *Devon*, who was proſecuted in the *Star-Chamber*, for abetting and comforting *Hull*, and other notorious Pirates. It was there reſolved that by the Common Law the Admirals ought not to meddle with any thing done within the Realm, but only with things done upon the Sea; and alſo by the Statute of 13 *R*. 2. *c*. 5. 2 *H*. 4. *c*. 11.

13 *Co*. 51.

It

It was likewiſe reſolved, that the ſaid Statutes are to be intended to hold Plea, and not of a power to award Execution; for the Judge of the Admiralty notwithſtanding theſe Statutes may do Execution within the Body of the County.

13 *Co.* 53. The Court of Admiralty is not a Court of Record, becauſe they proceed there according to the *Civil Law.*

Where one admits the Juriſdiction of the *Admiralty* by pleading there; no Prohibition ſhall be granted. *Jennings* againſt *Audley*, 2 *Brow.* 30. 12 *Rep.* 77. Therefore on Motion for a Prohibition in a Suit for Seamen's Wages, there the Suggeſtion was, that the Court below refuſed to allow the Defendant's Allegation; that the Place where the Plaintiffs entitled themſelves, was not a Port of Delivery: This is no Foundation for a Prohibition; if any thing it muſt be an Appeal.

Lord *Raymond*, 247.

Suit there for Contract upon Land Prohibition.

Cradock bought divers Things within the Body of the County, which concerned the furniſhing a Ship, as Cordage, *&c.* the Vender ſued him in the *Admiralty* Court; a Prohibition was granted, 2 *Brow.* 37. *Cradock*'s Caſe, *Owen* 122. 3 *Keeble* 552. *Merryweather* againſt *Mountford.*

Note, No Appeal from the Admiralty before a Definitive Sentence. Lord *Raymond*, 1248.

1. *Lev.* 243. *Yelv.* 135. 173. 1 *Sid.* 320. 2 *Saun.* 260. 2 *Lev.* 25. 1 *Ven.* 173, 308. 1 *Sid* 367. *Cro. Eliz.* 685.

The Defendant being Maſter of a Ship, of which the Plaintiff was Owner, the Ship was taken by Pirates upon the Sea; and to redeem himſelf and the Ship he contracted with the Pirate to pay him 50 *l.* and pawned his Perſon for it; the Pirate carried him to the Iſle of *Scilly*, and there he paid it with Money borrowed, and gave Bond for the Money at his Return; after the Redemption both of the Ship and himſelf he ſued in the *Admiralty* for the 50 *l.* and had a Sentence for it, and thereupon a Prohibition to the *Admiralty* was prayed but denied, becauſe the Original Cauſe began upon the Sea, and whatever followed was but acceſſory and conſequential. *Hard.* 183. Prohibition was granted to the *Admiralty* Court on the 22d and 23d *Ca.* 2. *cap.* 26. *Sect.* 11. in Suit there for the Forfeit of a Ship on ſelling Wares in *Ireland* without breaking Bulk, being put into *Ireland* from *America*, by contrary Winds, this being triable in the Plantations or any

any Court of Record in *Weſtminſter*. *Pidgeon con. Trent*, 3. *Keeble* 640, 647, 651. (*Vide Librum.*)

A Maſter of a Ship agreed with certain Merchants concerning a Voyage, and received Orders from them to lay in Proviſions of Meat and Drink, and to provide Mariners, *&c.* and after the Voyage was finiſhed, the Merchants refuſed to pay the Maſter of the Ship, what they had agreed for, upon which he libell'd againſt them in the *Admiralty*; Prohibition was granted upon the Statute of 2 *R*. 2. *cap*. 3. the Contract being upon Land, and denied the Caſe, *Hill.* 8. *Ca*. 1. *Cro*. 296. which ſaith that when a Thing is in its Nature Maritime, as in the Caſes of Mariners Wages, the Admiralty ſhall have the Conuſance of it. *Woodward* againſt *Boniſhan*, *Raymond* 3. and 3 *Levinz*. 60. *Coke* againſt *Cretcher*, &c. 2 *Vent*. 181. Prohibition does not lie for Mariners Wages.

If a Contract or Obligation be made upon the Sea, yet if it be not for a Cauſe Marine, the Suit upon this, ſhall be at *Common-Law*, not in the *Admiralty*, *Hob*. 11. Contract not Marine made at Sea.

If the Original Contract be made at Sea, on a Marine Cauſe, and after reduced into Writing at Land, the *Common-Law* not *Admiralty* ſhall have the Conuſance. *Hob*. 79. 212. *Palmer* againſt *Pope*. Contract at Sea ſettled at Land.

If a Charter-Party be made in *England* to do certain things in divers Places upon the Sea, tho' that no Act is to be done in *England*, but all upon the Sea, yet no Suit ſhall be in the *Admiralty* for Non-performance of the Agreement; for the Contract is the Original and is out of their Juriſdiction, and where part is triable at *Common-Law*, and part in the *Admiralty*; the *Common-Law* ſhall be preferred. *Maldonado* and *Slaney* 1 *Roll. Abr*. 532. 533. Common Law preferred.

A Contract laid to be made *infra fluxum & refluxum Maris*, *&c.* is well enough laid to give the Admiralty a Juriſdiction: It was upon the high Seas, when the Water was at High-Water-Mark; and it might be at Land when the Water was at Low-Water-Mark. In that Caſe there is *Diviſum Imperium* between the *Common-Law* and *Admiralty* Juriſdiction. Lord *Raymond* 1453.

It was moved for a Prohibition to the *Admiralty*, becauſe the Libel was to execute a Sentence of the Alcade which is the *Admiralty* at *Malaga* in *Spain*, upon a thing done within a Port there, and after a Rule for a Prohibition *niſi*, 'twas moved that no Prohibition ſhould be, for tho' Prohibition to the Admiralty for proceeding to execute an interlocutory Sentence of a Foreign Admiralty.

tho' this Court will not execute the Sentences of any Foreign Court, in as much that it is governed by a diſtinct Law, yet theſe of the *Admiralty* may, and this is their uſe to do ſo, for this that all the *Admiralty* Courts in *Europe* proceed by the ſame Law, *viz.* the *Civil-Law*, and *Wibrel* and *Wiat*'s Caſe 5. *Ja.* was cited, to be adjudged accordingly. But upon Reading the Libel in the Principal Caſe, it appears, that the Sentence was not Definitive, but Interlocutory concerning a Matter that ſounds as an Action upon the Caſe, and no Sum ſet; and alſo the Alcade is not as an *Admiralty* there, and for this a Prohibition was granted. *Jurado* and *Gregory*, 1. *Sid.* 418, 1. *Levinz.* 267. 1. *Vent.* 32. and 2. *Keeble* 512. 610.

1 *Ro. Ab.* 530. *pl.* 12. *Raym.* 473.

Reſcous and Contempt triable there.

Motion for a Prohibition to the *Admiralty*, for that they libell'd againſt one for reſcuing a Ship, and taking away the Sails from one that was executing the Proceſs of the Court, againſt the ſaid Ship, and for that in the preſence of the Judge and Face of the Court, he aſſaulted and beat one, and ſpake many opprobrious Words againſt him. Now ſeeing that theſe Matters were determinable at Law, the Ship being *infra Corpus Comitatus*, and they could not adjudge damages to the Party, or Fine or Impriſon, a Prohibition was prayed, but denied, for they may puniſh one that reſiſts the proceſs of their Court, and may fine and impriſon for a contempt tho' they are no Court of Record, but if they ſhould proceed to give Damages, they would grant a Probibition *quoad* that. *Sparkes*, &c. againſt *Martyn.* 1. *Vent.* 1. The ſame Doctrine Lord *Raymond*'s Reports, 446. and 1. *Vent.* is there cited.

Goods taken by Piracy, triable there tho' ſold at Land.

Yelv. 135, 173. *Hard.* 183. 1. *Sid.* 320, 367. 2 *Saun.* 260. 2 *Lev.* 25. 1 *Ven.* 173.

A Prohibition prayed to the *Admiralty*, where there was a Libel for a Ship taken by Pirates, and carried to *Tunis* and there ſold, for that it did not appertain to the Court to try the Property of the Ship being ſold upon Land. *Curia* in regard it was taken by Pirates, it is originally within the *Admiral* Juriſdiction, and ſo continues notwithſtanding the Sale afterwards upon the Land. Otherwiſe where the Ship is taken by Enemies, for that alters the Property. Contrary to my Lord *Hobart* in the *Spaniſh* Ambaſſador's Caſe 78. 1. *Vent.* 308. 3. *Cro.* 685.

If

If Ships or Boats are found on the Sea or upon the Coaſt, without any Living Creature therein, and no Man claiming the ſame within a Year and Day, the finder formerly uſed to have one Moiety, and the Prince the other Moiety, but now 'tis left to the diſcretion of the Admiral, what the finder ſhall have for his Travail, Charges, Danger. And if the finder conceal ſuch Goods, whether belonging to the Ship, as Anchors, Timber or other Goods, he ſhall not only loſe his Part, but be fined at the Will and Pleaſure of the Admiral. Ships found at Sea belong to the Admiral.

If Whales or other regal Fiſh, Ships or Boats without any Living thing in them, be driven by force of Wind or Waves only, to any Coaſt or Land, then all doth belong to the Admiral, *Lex Mercat.* 120. Royal Fiſh *Deodands.*

See more of this Matter, 4. *Inſt.* 134, *&c.* of the Court of *Admiralty.* 1. *Roll. Abr.* 528, *&c.* Title Admiralty.

After Sentence in the *Admiralty* Court for the ſeizing of a Ship, Trover and Converſion at Law will not lie, *Beake contra Thynwhitt*, Laws of the Sea, 425. Trover after Sentence will not lie.

Hutchinſon killed one *Colſon* in *Portugal*, and was acquitted there of the Murder, the Exemplification of which Acquittal he produced under the Great Seal of that Kingdom, which by the Opinion of all the Judges was ſuch an Acquittal by their Law, that he could not be tried here again. Acquittal of Murder in the Admiralty in a Foreign Kingdom, he ſhall not be tried again here.

The *Admiralty* hath not Juriſdiction of *Wrecke.* 5. *Rep.* 106. 2. *Inſt.* 167. 4. *Inſt.* 154. 15. *R.* 2. *c.* 3.

Caſe upon the Statutes, 13. *R.* 2. *c.* 5. 15. *R.* 2. *c.* 3. and 2. *H.* 4. *c.* 11. for ſueing in the *Admiralty* for matters done upon the Land, and declared that the Plaintiff was going from the Port of *London*, with his Ship laden with Merchandizes, and that the Defendant brought a Suit in the *Admiralty* to ſtay the Ship, till caution ſhould be given, that ſhe ſhould not traffick with Infidels, within the Limits of the Charter of the *Eaſt-India* Company; and that they procured the Ship to be arreſted by Proceſs of the *Admiralty*, and to be detained, by which the Plaintiff loſt the Profit of his Voyage; upon not guilty pleaded, a Special Verdict was found, *viz.* they found the Charter of the *Eaſt-India* Company of 13. *Car.* 2. by which they are incorporated, and had the ſole Trade to the *Eaſt-Indies*, granted to them with a Prohibition Caſe for ſueing in the Admiralty for matters at Land.

to all others to traffick with *Infidels* there upon pain of Forfeiture of Ship and Goods, and that the Plaintiff had prepared a Ship and Goods to go to the *Eaſt-Indies* to Traffick with Infidels within the Limits of the *Eaſt-India* Company, upon this they petitioned the King in Council to ſtay the Ship, where an Order was made to the *Admiralty* to ſtay the Ship by their Proceſs, which iſſued accordingly, and the Ship was ſtaid, *prout*, &c. all which was done by the Defendants as Agents of the Company, and they as Agents paid the Fees of the Proſecution, and if guilty, Damages for the Plaintiff *in duplo* 1500 *l.* ſo upon Arraignment judgment for the Plaintiff, and on Error affirmed. *Sands* againſt Sir *Joſias Child* and
4. *Inſt.* 138. others. 3. *Levinz* 351. *A like* Caſe 1. *Vent.* 47. *Home* againſt *Ivie.*

CHAP. VII.

Of Dominion eſtabliſhed by Treaties of Alliance in general.

I. *Of Treaties their ends.*
II. *Of the matters conſiderable in the making of them, and how the overtures are made.*
III. *Of the various Sort of Treaties, and firſt of thoſe by interview.*
IV. *Of the pretexts generally made to obtain ſuch Treaties.*
V. *Of Princes equal, the honour is to be paid by him in poſſeſſion.*
VI. *Of Treaties by Princes unequal.*
VII. *Of Treaties ſecret and open.*
VIII. *Of Things requiſite for Princes during ſuch Treaties.*
IX. *Of Places proper for Treaties.*
X. *Princes where obliged to treat perſonally, and where not.*
XI. *Deputies, their demeanor generally conſidered in Treaties.*
XII. *Of the Clauſes generally to be conſidered in Treaties general and particular.*
XIII. *Of the nature of Treaties generally conſidered as to their ends, and where they determine by the Death or Diſpoſſeſſion of a Prince, and where not.*
XIV. *Of Treaties to what end, and how they have been ſtrengthned in* England.
XV. *Of the Cauſes ordinary procuring ſuch Leagues.*
XVI. *Of Leagues by way of Mediation tending to the procuring of a general Peace with Warranty.*
XVII. *Conſiderations on Leagues defenſive and offenſive, and of the Advantages and Diſadvantages thereof in reference to the Eſtate confederate.*
XVIII. *Leagues defenſive conſtrued offenſive in favour of the oppreſt.*
XIX. *Contribution, the difficulty in regulating*

regulating the ſame to the ſatisfaction of the Perſons intereſſed.
XX. *Of Leagues concluded by Deputies, and the Difficulties uſed to delay, by which deſigns may ſecretly be carried on.*
XXI. *Conſideration had on Leagues made for carrying on ſome particular Enterprize.*
XXII. *Of the Cauſes that generally occaſion a Rupture.*
XXIII. *Of the Obligation on Confederates in reference to mutual Succours.*
XXIV. *Of Aid granted to particular and common Allies when invaded by one another, and of Protection granted a People when oppreſſed, whether Aid to ſuch may be conſiſtent with a League.*
XXV. *Whether the Oath taken for the Performance of the League be perſonal, or binds the Succeſſor, and of the Interpretation of the ſame.*
XXVI. *Of Leagues made with Princes when driven out of their Countries, whether they remain valid and firm.*
XXVII. *Whether Leagues may be entred into by Chriſtian Princes with Infidels.*

I. TREATIES are occaſioned by a wiſe and prudent Care of inſpecting the Motions of Neighbours and of their Affairs, the which are generally reduced to theſe Three Heads, upon the Conſiderations,

1. How a Prince ſhould govern himſelf with his Neighbours.
2. In gaining a Credit among them, and to have a part in their Deliberations.
3. Is the main, which is to pierce into his Neighbours deſigns; for thoſe Centers being diſcovered, a Prince eaſily knows how to draw his Lines.

II. In Treaties, the firſt thing to be conſidered is the manner of making the Overture; and therefore it may ſo happen, that of two Princes who are Enemies, the one will not ſeek unto the other for an accord; therefore the general *Medium* is, that the motion be propounded by ſome greater Prince, or by ſome Neighbour that is a Friend to both, and ſometimes the Miniſters of two Princes meeting * accidentally, if they be employed, yet propound an Accommodation. When a Prince or State is exaſperated with another, and having gotten an Advantage, will often refuſe to treat any where but in his own Country, nor that unleſs firſt ſought to by a ſubmiſſive

* *Argenton* and a Steward of the Duke of *Mantua* meeting at *Creal Carragio*, to condole in their Maſters names for the Death of the Marqueſs of *Forcat*, made an overture for the Treaty of Peace betwixt *Charles* the Eighth and *Lewis Sforſe*.

Requeſt, as by Letter, &c. So they of † *Holland* and *Weſt-Friezeland* conſidering the miſerable Diſtreſs and incorrigible Diſorders of their People, did ſubmit thus to confeſs their Errors.

† *March* 8. 1653. by order of thoſe States, ſubſcribed *Herbert Van Beaumont*, and afterwards by a Letter from the *States General* praying a Neuter place, *April* 30. 1653. then by a Petition 13/13 *June* after. *Leo ab Aitzma*, fol. 817, 818, 825.

III. Treaties are acted either by the interview of Princes, or by perſons ſufficiently commiſſionated for that purpoſe.

Thoſe that are by interview, have been often diſapproved, though often practiſed; but that depends rather on the Eſtate of Affairs, and the conformity and diverſity of Honours, and manner of living of the Princes and their People, than of the interview: that of *Lewis* the Eleventh with Duke *Charles of Burgundy*, and of the ſame King with *Edward* the Fourth of *England* paſt fairly: And in all ſuch Treaties they govern themſelves in reference to their ſupplies, according to the Confidence which they repoſe in each other. ‖ But thoſe interviews of Princes have ever been obſerved dangerous; for Princes meaſure their quality, not by the extent of their Dominions, but by the abſoluteneſs of their Power: So that he that is Supreme and Independant in his own Country, counteth himſelf equal to any other Prince, how great ſoever. Perchance ſome youthful Kings may diſport and ſolace themſelves in one another's Company, whilſt yet Pleaſure is all the elevation of their Souls; but when once they grow ſenſible of their own Greatneſs, (a Leſſon they will quickly learn, and ſhall never want Teachers) then emulation will be betwixt them, becauſe at their interview they cannot ſo go in Equipage, but one will ſtill be the foremoſt, either his Perſon will be more proper, or Carriage more Court-like, or Attendance more Accompliſhed, or Attire more Faſhionable, or ſomething will either be or be conceived to be more Majeſtical in one than the other: And Corrivals in Honour count themſelves eclipſed by every beam of State which ſhineth from their Competitor; therefore ſome hold the beſt way to keep great Princes to-ther is to keep them aſunder, accommodating their Buſineſs by their Ambaſſadors, leſt the meeting of their own Perſons part their Affections, as it fell out between King

‖ *Jugurtha* taken by his Father-in-Law *Bocchus* and delivered to the *Romans*; *Charles* the Seventh of *France*, at a perſonal Treaty with the Duke of *Orleans*, ſlew the Duke, though a Sovereign Prince. *Mayer lib.* 15. *Phi. Comines lib.* 4. *cap.* 10.

King *Richard* of *England* and *Philip* of *France*, and *Maximilian* the Firſt and *Lewis* the Twelfth.

Richard Hoveden in Rich. 1. *fol.* 666.

IV. It is preſumed, that the Perſonal Treaties of Princes are not for matters ſmall and trivial; therefore it is an undoubted Maxim, *That as Jealouſies may be increaſed amongſt Neighbours, by reaſon of ſuch perſonal interviews, ſo they muſt find out ſome apparent and important pretext, which being made known and publiſhed to remove the Jealouſies of their Neighbours, they may then under ſuch colour and ſhadow, treat the moſt ſecret of their Affairs.* So Pope *Clement* the Seventh under the borrowed Pretext of a general Peace and League againſt the *Turks*, (which ſounded pleaſingly in the Ears of all Princes) at *Marſeilles* concluded the Marriage of his Niece with *Henry* the Second of *France*.

V. But if of two Princes, the one goes home unto the other, he is bound to do him the Honour of his Houſe; And if the Prince be inferior to him, he commonly ſends forth ſome of the principal Officers of his Court to receive him; but if he be his equal in Quality, as being both Kings, although there be ſome debate betwixt them for precedence, if he come firſt to the place where the Treaty is to be made, he muſt go in Perſon and not by Proxy.

In the interview that was between *Lewis* the Twelfth and *Ferdinand of Arragon* at *Savona* (which then belonged unto the *French* King) *Lewis* the Twelfth at the approach of *Ferdinand*'s Galley (before he could land) enter'd into it, accompanied only with his *Guard*, to teſtify his confidence, and thereby to aſſure King *Ferdinand* of that which he had promiſed he ſhould find in him; and at their going to Land, King *Lewis* left the Right-hand to *Ferdinand*, who lodged in the Caſtle, as the moſt honourable Place, and himſelf went to the *Biſhoprick*.

Vide Æmilius Paulus's Hiſtory of *France*; and *Ferron* his ſupply of the ſame, of the like of the Duke of *Orleans*, afterwards *Lewis* XII. upon the failure of iſſue male of *Charles* the 8th.

VI. By the Laws of *Treaties*, when two Princes unequal in Quality parley, the inferior is to come firſt to the place of congreſs there to attend the Greater; yet the contrary hath been moſt commonly obſerved upon this very reaſon, that he that is leſs ought firſt to wait on the Greater, and from thence go to the place appointed for the Parley; and this was particularly done at the interview of Pope

Clement the Seventh and King *Francis* the Firſt, although that *Marſeilles* were in the King's Subjection.

VII. Again, Treaties by thoſe that are ſufficiently commiſſionated for that purpoſe, are to act either ſecretly or openly. Treaties cloſe or ſecret are uſually made in order to the compleating or ſettling of Leagues between two Princes or States, ſometimes by entertaining him with whom they treat under ſuch a Pretext, to deceive him in the end; at other times to ſurprize an Enemy, or to aſſure a Prince of two Enemies, treating with one ſecretly, the other openly, and the like. Theſe are the ordinary Policies among Princes, and wherewith the wiſeſt of Kings †, and the moſt knowing Councils have been deceived and abuſed even to accept of a Treaty, when at the ſame time the Propoſer hath no other thoughts than to betray them: the *Spaniards* have been famous at theſe Projects. Memorable was that deſign of theirs to interrupt the League which was ready to be made between the Princes of *Italy* and Pope *Clement* the Seventh, after the Battle of *Pavia*, propounding unto the Pope to treat and accord, the which not only hindred the League, and ſtaid the preparations of War which he might make, but alſo cauſed him to diſcharge the Troops which he had drawn unto him for his ſafety. So *Bourbon*, General of the Imperial Army, entertained the Pope with an accord, whilſt his Army marched to the Walls of *Rome*.

† So *Maximilian* and *Ferdinand* having twice abuſed *H*. 8. propoſed a third, which was that he would reſign up the Imperial Crown to him; the Reſignation is ſent to *England* and approved, *H*. 8. is to come to *Aquiſgrave* to receive the Crown, and *Maximilian* is to accompany him to *Rome* to receive the laſt Right of the Imperial Dignity, and having given him the Inveſtiture of *Milan in feodo more Imperiali*, then in poſſeſſion of the *French*, and in enmity with the Houſe of *Auſtria*: all things being thus concluded, and *H*. 8. having paid the Monies agreed on, and made ready his preparations. *Charles* the Fifth and Grandſon of *Maximilian*, is a rub in this League, who muſt be firſt removed; thereupon the old Fox the Emperor ſends a Propoſal, that he would come firſt into the *Netherlands* to take off his Grandſon, which while agitating, he ſtrikes up a ſecret Peace with the *French* King, and ſo *H*. 8. is betrayed a third time and the agreement refuſed to be complied with, *Cotton Treaty of Amity*, *fol*. 99.

VIII. Hence it is, that during Treaties, be they open or ſecret, the Princes or States concerned in them, muſt watch the more carefully, have the diligenter Eye, and by all the ways imaginable reinforce their ſtrength; not only to fruſtrate their Enemies of all hopes to ſurprize them, but to the end the Conſideration of their Force

and

and Opulency may put them in a poſture to obtain Conditions of more Advantage. Beſides, it is an undeniable Maxim, that no treaty muſt be held firm, valid, and concluded, unleſs it be ratified by that Prince or State with whom the ſame is made, eſpecially if it be with a Prince whom they detain Priſoner; for by † Law the force by the which he hath been conſtrained to promiſe, will at leaſt diſpenſe with him ſo far as to re-adviſe, if not to break.

† *Sacramento quidem vos tenere qui potuit, quum projectis facibus & depoſito Imperio privatus & captus ipſe in alienam veniſſet poteſtatem?* Curio *in* Cæſar, to thoſe that had been the Soldiers of *Domitius*, ſo ſpake, *lib.* 11. *de Bello Civili. Vide Grot. lib.* 2. *cap.* 13. §. 18. Pope *Clement* the Seventh refuſed to ratify the Treaty with Duke *Ferrara* which he made when a Priſoner, ſaying, That it was a diſhonourable thing for a Man in Life to ratify a matter done in his Name when dead, not conſiſtent with his Honour nor Intereſt. So *Francis* the Firſt excuſed himſelf to ratify the Treaty of *Madrid*, upon the inhumanity done to him by the permiſſion of *Charles* the Fifth, they being extorted from him, nor did they take place, though the King left his Children as Hoſtages.

IX. Again, as in the Parlies of Princes, the place where the Interview is to be made is very conſiderable; ſo is it in Treaties which are tranſacted by Embaſſadors, Agents, Envoys, *&c.* if it be to compleat a Peace, or ſettle a League, it muſt not be too far from the Confederates, but at ſome convenient place, to the end they may have the more ſpeedy Anſwers from their Principals; but then the firſt is always to be in ſome place Neuter, or ſometimes upon the Confines of Kingdoms; for that it is neither reaſonable or honourable to treat a Peace in the Territory of one's Enemy; but the latter touching Leagues may be any where. That of *Edward* the Fourth with *Lewis* the Eleventh was in the Territories of the Duke of *Burgundy*, but that was perſonal: And that between *France* and *Spain*, concluded by Cardinal *Marazine*, and *Don Lewis Mendez de Haro*, Plenipotentiaries of both Crowns, was in the Iſle of *Pheaſants* in the River *Bidaſſoa* upon the Confines of the *Pirenæan* Mountains. And the laſt great Treaty which begun at *Cologne* in the year 1673. under the Mediation of *Swedeland*, in order to put an end to that War wherein moſt of the Crown'd Heads of *Europe* were involved, was look'd upon as a place proper; but the ſeizing of Prince *William* of *Furſtemberg*, and the taking of forty thouſand Crowns out of the Waggons of

November 7. 1659.

the *French* Embaſſador in a Neutral City, broke off that Negotiation; and though the violence committed on this Prince, by the Emperor's Miniſters, and the Injury done to the *French* King, gave ground to fear, that there was no Peace to be expected, and that the Moſt Chriſtian King would never conſent to the renewing of the Treaty, unleſs reparations were firſt made for thoſe two injuries: Nevertheleſs, at the inſtance of the King of *England* (whoſe Mediation was generally embraced by all the Princes concerned in that War) and at the ſolicitation of the Biſhop of *Strasberg*, who publickly declared he preferred the Advantages of Peace before the Liberty of his own Brother; *Nimeguen* was pitch'd upon as a place neuter and proper for a Treaty, and thereupon the *French* King, 17 *February*, 1675, named for that Effect the Duke of *Vitry*, Monſieur *Colbert*, and the Count *D'Avaux*, his Embaſſadors.

X. *Embaſſadors* having received Orders to treat, the Prince, to whom ſuch are ſent, is not by the Law of Treaties bound to treat perſonally, but only to depute ſome of his Council for that Effect; the Reaſon is, for that the Dignity of a Prince may receive ſome detriment which cannot be maintained amidſt the Conteſtations which happen in Conferences.

Julius Ferretus de Legatis Principum, & de earum fide & officio.

But if an Ambaſſador be deputed as Lieutenant to a Prince, there indeed ſuch Commiſſioner is not bound to treat but only with the Prince himſelf: and ſo it was where the Biſhop of *Gurgia* was deputed by the *Emperor* to Pope *Julius* the Second: the Pope commiſſionated three *Cardinals* to treat with him; but the Biſhop having notice in what quality he was like to be received, commiſſionated three Gentlemen to confer with them, excuſing himſelf upon other Affairs; which afterwards was explained, that he came not as a ſingle Embaſſador, but as a Lieutenant to the *Emperor*, in the which Quality he had been received at *Rome* by the *Pope*; Yet it hath ſo happened, that Embaſſadors, if not admitted to a perſonal Treaty, have refuſed the Diſcharge of their Commiſſion; and ſo did Chancellor *Marvel*, Embaſſador from the *French* King, who delivered his Meſſage to *Philip* Duke of *Burgundy*, was interrupted by *Charles* the Duke's Son. *I am ſent*, ſaid he, *not to treat with you, but with your Father*; and Mr *Wade*, who being commiſſionated by Queen *Elizabeth*

There is commonly in the inſtructions provided for the Embaſſador in that point if the matter ſhould come into debate.

Phil. Comines. lib. 1.

Elizabeth to *Philip* King of *Spain*, would by no means admit himſelf to be turned over * to the *Spaniſh* Privy-Council, but would either have Audience from the King himſelf, or would return without it.

* *Cambden Eliz. in An.* 1584 *fol.* 380.

XI. The *Deputies* being aſſembled, their Seats are conſiderable; they having no power to quit any thing of the rank which their *Maſters* ought to hold: and by the Law of Treaties the firſt place is at the head or end of the *Table*, (if there be one) the ſecond is the firſt on the right hand, and the third is the firſt on the left hand of him that is at the end: and if there be many *Deputies* to one Prince, they uſually ſit at one ſide, to have the more facility to confer together, if it be needful.

XII. The Embaſſadors having concluded and ſettled their Places, their Commiſſions of each ſide are to be inſpected and conſidered: and therefore it is an undoubted Maxim, That when they are general or ambiguous, the Principals have no will to conclude; or if they are fair and plain, yet there may be wanting power to conclude; or having power to conclude, it may be with a Salvo, till they are ratified.

So *Julius* the Second did, who finding himſelf preſt to make Peace with *Lewis* 12. ſent Cardinal *Final*, and Biſhop of *Tivoli* to *Paris*, but never armed them with Power to conclude: this was to fruſtrate the important inſtance of the Conſiſtory.

The principal Clauſes generally are,

1. Either for Peace or Truce.
2. For Reſtitution of that which they pretend hath been unjuſtly taken away.
3. For the Ceſſion of Rights.
4. For Limits and Bounds, the which if they cannot regulate, they put them in ſuſpence, or elſe they make ſome Act which may interrupt the preſcription of him which holds them.
5. For paſſage, with Conſignation of Hoſtage.
6. For Forts or Caſtles for Aſſurances.
7. For an Offenſive and Defenſive League.
8. For Neutrality.

In the managing of all which, and of all other matters proper for ſuch Treaties, a ſpecial regard muſt be had not to move for a Perſon odious to him with whom the Treaty is made, nor to yield to the firſt demands though never

never ſo juſt, but reſiſt them ſtoutly; but if danger is imminent, then it is a certain Maxim, *Not to ſtudy ſo much to negotiate with advantage, as to provide for ſafety.*

XIII. Treaties which are made with our Neighbours as Friends, are called *Treaties of Alliances, equal* or *unequal.* The *equal* is either of ſingle Friendſhip only, for the entertainment of Traffick, or for aid and ſuccour; that of ſuccour is for the *Defenſive* or *Offenſive*, and ſometimes for both, with or againſt all Men, or againſt ſome certain Princes and Republicks; and their Alliances are contracted, either from *Eſtate* to *Eſtate*, and for the Preſervation of the *Eſtates* of each other (in which caſe by the death of the Prince they may not be interrupted) or elſe they are contracted betwixt *Prince* and *Prince*, and then the death of one ſuſpends till a new Treaty hath confirmed it, unleſs there is a time certain preſcribed by the *Treaty*, to the which the Alliance muſt continue after the death of the *Prince*; or elſe they are made from an *Eſtate* to a *Prince*, where the death of the Prince does likewiſe, if not diſſolve, yet at leaſt ſuſpend till a new Treaty of Confirmation of the precedents, although by the Laws of *England*, *Rex non moritur.*

The Leagues between the Crown of *France* and *Spain*, are commonly between Kings and Kings, Realm and Realm, and Man and Man of their Subjects, and have in time paſt been look'd upon to be the firmeſt of Alliances. *Phil. Comines lib.* 2. *cap.* 8. And in the very Alliance with *France* concluded *July* $\frac{3}{3}\frac{1}{1}$.. The firſt Article is in theſe words: *That there be an univerſal and perpetual, true, and ſincere Peace and Amity between the Moſt Chriſtian King and the King of* Great-Britain, *their Heirs and Succeſſors, and between the Kingdoms, States, and Subjects of both,* &c. *Vide* 9 *E.* 4. 2 *a.* The League then made with the *Scots*, and likewiſe between *Edward* the Fourth and the Duke of *Burgundy*. *Phil. Comin. l.* 3. *c.* 6.

XIV. Sometimes *Alliances* are contracted for an Enterprize and for one effect only, in the part in which the Allies are intereſſed, and ſuch are generally called *Leagues*, which in *England* have been ſometimes confirmed by *Act of Parliament* *.

* *Rot. Pat.* 4. *H.* 5. *num.* 4. *Coke* 4. *Inſtit.* 156.

Leagues are ſuch Agreements that are made by the Command of the ſupreme Power, and whereby the whole Nation is made liable to the Wrath of God, if they infringe it.

Grot. *de jure belli & pacis l.* 2. *c.* 15. § 3.

All Leagues or Safeconducts are, or ought to be of Record, that is they ought to be inrolled in the Chancery, to the end the Subject may know, who are in Amity with the King, and who not, who are Enemies and can

have

have no Action here, and who are in League and may have Actions Perſonal here, 4 *Inſt*. 152.

Leagues commonly are *Offenſive*, but in effect they tend to attempt againſt ſome one, and in the bottom are lodged *Articles of Secrecy for the Enterprize*: and ſuch was that of *Cambray* againſt the *Venetians*, in which they borrowed the *pretext of Religion and the Peace of Chriſtendom*.

Treaty of *Cambray*, the Confederates of which were Pope *Julius* the Second, the *Emperor*, Kings of *France*, *Spain*, and *Arragon*, *Anno* 1558. *Vide* Hiſtory of the Republick of *Venice*, *fol.* 87.

XV. The ordinary cauſes for which *Princes* and *Republicks* make Leagues, are either to facilitate a Conqueſt, as that that was made between *Lewis* the Twelfth and *Ferdinand of Arragon*, for the Realm of *Naples*; or to balance the Forces of one that is more mighty, in hindering him that he grow not greater; but Arms ought not to be taken to diminiſh ſuch a Neighbour's power, for that fear is uncertain; but prudent Leagues may be made for diminiſhing their Power.

Sed ut vim pati poſſe ad vim inferendam jus tribuat, ab omni æquitate abhorret. Grotius *de jure belli & pacis l.* 2. *c.* 15. § 17.

The *Engliſh* made a League to ſuccour the *Hollanders*, not only to balance the growing opulency of the *Spaniſh* Monarchy, but likewiſe to increaſe her own by the Alliance of the *Dutch*. *Quid ſequitur?*

XVI. Again, Leagues may be made for the procuring of a general peace by way of *Mediation* of their Neighbours in War, and ſuch was the Treaty of *Nimeguen* mediated by the King of *England*, and concluded *Aug.* 10. 1678. between the Ambaſſadors and Plenipotentiaries of his moſt Chriſtian Majeſty on the one part, and the Ambaſſadors and Plenipotentiaries of the Lords *States General* of the *United Provinces* on the other part; ſuch was alſo the League of Union propounded by his late ſacred Majeſty King *Charles* II. and afterwards concluded betwixt him and the *States General* of the *United Provinces*, for an efficacious Mediation of Peace between *France* and *Spain*, his ſacred Majeſty of *Britain* having a Proſpect to what afterwards happened, and of a War, wherein moſt inevitably would be involved moſt of the Princes in *Chriſtendom*; to the effecting of which Peace, his Majeſty and the *States General* did obtain a promiſe

from

from the *French* King to the *Dutch*, to lay down Arms, on condition the *Spaniards* would formally and ſolemnly by a Treaty of Peace, quit to him all thoſe Places and Forts, together with the Chaſtellenies, and their Appurtenances, which they by force of Arms had taken in, or fortified in the then laſt year's Expedition; or, otherwiſe that the *Spaniard* be brought to transfer to the *French* all their remainder in the Dutchy of *Luxemberg* (or to the County of *Burgundy*) together with *Cambray* and *Cambreſis*, *Douay*, *Ayre*, *St Omers*, *Bergue*, St *Winox*, *Furnes*, and *Lynk*, with the Bailiwicks, Chaſtellenies, and all other their dependencies; and the *French* King to reſtore to the *Spaniard* all Places, Territories, which they have by Arms taken ſince their entrance into *Flanders*, on condition that the *States General* do reciprocally undertake and ſecure to the *French*, to prevail with the *Spaniard* to conſent to the ſame Conditions, which once effected would (as was hoped) initiate the tranquillity and be the intereſt not only of the two Warring Crowns, but of all other the Princes of *Chriſtendom*. To the effecting of which there were ſeveral Articles agreed; and likewiſe it was agreed, that if a peace ſhould happen to be made, his Majeſty and the *States General* ſhould become Warrantees, and a place left for any other Prince or State to come into the ſame, who ſhould think it their Intereſt to keep the Peace of *Chriſtendom* undiſturbed, and to reſtore the *Low-Countries* to their tranquillity: there was proviſion made likewiſe by the ſame, for the Forces of each of the Warrantees to be uſed againſt thoſe that ſhould break and violate the ſame, obliging them to ceaſe the violence, and repair the Party injured.

League of Union between his Majeſty of *Great Britain* and the *States General* of the United *Netherlands*, concluded at the *Hague*, *Jan.* 1/23 *Anno* 1668.

XVII. A *Defenſive League*, which hath no other benefit but a neceſſary defence, and in the which mean Eſtates are in a manner equally intereſſed, laſt uſually longer than an *Offenſive League*, which is voluntary, and from the which either of the *Confederates* will eaſily part when he hath more intereſt: So as in *balancing* the intereſt of the one and the other, he that ſhall find himſelf accompanied with diſtruſt, and an opinion to be irreconcilable to the common Enemy, generally proves the moſt firm in the League.

The Anſwer of the Ambaſſador from *Privernum* to the Senate: *Si bonam dederitis & fidam & perpetuam, ſi malam haud diuturnam*, *Liv.lib.* 8.21.

The

The *Wiſdom*, *Courage*, *Means*, and *Conſtancy* of the Prince or State is to be conſidered; ſo likewiſe the *diſtance* of the *Places*, as well in regard of thoſe with whom they unite, as of thoſe againſt whom they make the Leagues.

XVIII. *Leagues* having no other limitation, *but the end of the Enterprize* for which they are made, have admitted many large debates in caſes of accident: For inſtance, If an Enemy ſhould take the Country, for the defence whereof the Leagues was made, the Queſtion has been whether the *Confederates* be bound to aſſiſt him who hath loſt it in the Recovery; ſome have held, that the *Defenſive* did not extend ſo far: notwithſtanding if there were no Treaty, which had concerned this Conqueſt, yet it would ſeem more reaſonable to comprehend the Recovery in the defenſive, if it be general. For as its end is to preſerve the *Ally in his State*, and to attain it, the Forces muſt not only remain in the Country of the *Ally* to attend the Enemy; but after denunciation and other acts of Hoſtility done by the Enemy, they muſt enter into his Country, to the end to prevent him or divert him from attempting any thing againſt the *Ally*, the *Offenſive* being judged by the *aggreſſion*, and not by *that which follows*; by a ſtrong reaſon they ought to enter into the Country conquered from the *Ally*, for the Recovery thereof; but Excuſes in this kind proceed from thoſe who fail in their faith, courage, or means to recover.

Pontius Samnis after reſtitution made to the *Romans*, and the Author of the breach yielded up, *expiatum* (ſaith he) *eſt quicquid ex fœdere rupto irarum in nos cœleſtium fuit. Satis ſcio quibuſcunque Diis cordi fuit ſubigi nos ad neceſſitatem cedendi res, iis non fuiſſe cordi tam ſuperbè à Romanis fœderis expiationem ſpretam*: And a little after, What more do I owe to thee, O *Roman*? what to the League? What to the Gods, the Judges of the League? Whom ſhall I bring unto thee to be the Judge of thy anger and of my puniſhment? I refuſe no People, nor private Men.

XIX. *Contribution* is one of the main ingredients in a *League*, and is of great difficulty to regulate. It is made either in *Men* or *Money*; the Men are entertained *by all Parties*, or *by him only that hath need*, or otherwiſe as the League is. *Henry* Eighth made a League with *Francis* the *French* King againſt the Emperor *Maximilian* and *Ferdinand*, for the Recovery of *Milan*, which he did, for the protection of his Neighbour, and Reduction of the *Swiſſe* from the *Imperial* ſide, for which he employed the *Baſtard of Savoy*; the agreement was of reciprocal Succour

An. 1515. *Vid.* Sir *Robert Cotton Remonſt.* of the Treaties of Amity and Marriage.

cour of 10000 Men, if the War were by Land, and of 6000 if it were made by Sea; and in all other occaſions, the *French* King was bound to aſſiſt the King of *England* with 12000 *Lances*, and he the King of *France* with 10000 Foot at his charge that had need.

So where *Contribution* is concluded for Money, there are difficulties that do ariſe from the *Perſon* or *Place* where it muſt be kept; to deliver it into the hand of the ſtrongeſt, is not ſafe, *for fear they ſhall not be able to call him to account*; to lay it in a weak place, were to expoſe it *to the attempt and force of the ſtrongeſt*, or to him that ſhall firſt *take Arms*; but it has been uſual for the ſum not to be advanced till after the War begun.

XX. Leagues concluded by the *Deputies* of the *Confederates*, there ſometimes falls out a difficulty who ſhall ratify and declare himſelf firſt. In the League which was made between *Francis* the Firſt, the *Pope*, and the *Princes* of *Italy*, the King refuſed to ratify until the *Pope* and *Venetians* had ratified before him, and in that he ſo cunningly wrought, that he procured the *Collegues* to declare and begin the War, whilſt that he treated ſecretly for himſelf, to the end he might make his Conditions with more advantage; this he declared was for fear thoſe *Italian Foxes ſhould ſhew him the like.*

Andrea Mauroceni Hiſt. Ven.

XXI. *Leagues* made for an Enterprize ſucceed ſeldom according to the hope of the *Allies*, *if the Enterprize be long*; for beſides that the preparations be long, the opinions divers in the purſuit, the reſolutions inconſtant, the intereſts of Princes or States in a League may change with time, or with the practice of him againſt whom they are in League, in withdrawing ſome one of them, or making him to ſuffer more loſs than the reſt; for ſeeing himſelf *ill defended or ſuccoured* by his *Confederate*, and that he was in a greater danger to loſe than his Companions, he then ſtudies to retire * and to make his *accord apart*, as did the *Venetians* with the *Turks*, after the loſs of *Cyprus*.

* If one part hath violated the League, the other may depart from it; for the ſeveral Heads of the League have every one the force of a Condition, ſo *Grotius* conceives, *l.* 2. *c.* 13. §. 15.

XXII. The ordinary cauſes of the Rupture of *Leagues* are *diſtruſt* and *jealouſy*, as if one hath had conference with the Enemy, without the conſent of the reſt; if that which ſerveth

Soluti fœderis culpam ſuſtinent, non qui deſerti ad alios ſe conferunt.

ſerveth for the *ſafety of one*, diminiſh the *ſafety of the other*, *inconſtancy*, *variety*, *cowardice*, *diviſion*, *uſurpation* without the conſent of the others.

So if he treats with the Enemy, not comprehending the other *Allies*, but as *Adherents*; as *Lewis* the Twelfth left the League of the *Venetians*, for that they had made a Truce with him, and had preſumed to name him only as an *Adherent*. It was the opinion of *Bryan*, that if all the Subjects of *England* would make War with a *Confederate Prince* or *Republick* in League with the King of *England*, without the aſſent of the King of *England*, ſuch a War was no breach of the League; and upon the ſame reaſon were the reſolutions of the Judges in the Duke of *Norfolk's* Caſe, where the Queſtion was, Whether the Lord *Heriſe* and other Subjects of the King of *Scots*, that without his aſſent had waſted and burnt divers Towns in *England*, and proclaimed Enemies, were Enemies in Law, within the *Statute* of 25 *E.* 3. the League being between the *Engliſh* and *Scots*, and reſolved they were, and that the League remained.

ſed qui quam jurati promiſerant opem re non præſtant. Alibi apud eundem, ſi vel tantillum ex dictis pars alterutra tranſgrederetur, rupta fore pacta. Thucyd. *lib.* 1. 19 *E.* 4. *Vide Stat.* 2. *H.* 5. *c.* 6. *Hill.* 14. *Eliz.* in the Duke of *Norfolk's* Caſe. 4. *Inſt. fol.* 152.

XXIII. The Succours that one *Confederate* muſt afford another *Confederate* (according to the *Law of Leagues*) againſt a *Confederate*, is of great Conſequence: Three Princes allied, the one makes War againſt the other, and demands ſuccours from the third; in this Caſe, if the Treaties of Alliance be only for *Friendſhip*, it is certain he is not bound to give any ſuccours: But if the Treaty carries an *offenſive League*, he muſt ſuccour the moſt *antient allied by a precedent Alliance*. If the precedent Alliances have been made both at one time, he muſt ſuccour him that is allied in an *offenſive* and *defenſive League*: But if the League be *offenſive* and *defenſive* of either ſide, *he ought not to ſuccour either*; but he may mediate a * Peace, and cauſe the difference to be judged by the *Common Allies*, which being propounded with a Declaration, that if one refuſe, or having once ſubmitted, will not yield to Judgment, he will ſuccour the other, as the *Swede* and *Swiſs*, upon ſeveral occaſions have done; notwithſtanding in point of State on ſuch occaſions they uſually balance their Eſtate, and looking *more to ſafety than Juſtice*, they ſuccour him who being enforc'd, may weaken the powerful, who is more to be feared; yet to unjuſt Wars there is

In fidelitate feudali dicitur; Et ſi ſcivero velle te aliquem juſte offendere, & generaliter vel ſpecialiter fuero requiſitus, meum tibi, ſicut potero, præſtabo auxilium. Orat. Demoſthen. *de Megalopoli.*

* *Nihil intercedi, quo minus Samniti populo pacis bellique liberum arbitrium ſit. Liv. l.* 8. Grotius *de Jure belli ac Pacis lib.* 2. *cap.* 15. §. 13. *Vide Monmouth* Hiſtory of *France fol.* 31.

is no obligation; then certainly he ought to be preferred, who hath a juſt cauſe of War.

XXIV. By the *Laws of Alliances* Princes may aid *particular and common Allies*, if they be wronged by one of the *Allies*.

Equals cannot directly refuſe War, nor demand Peace.

But he which is not comprehended in the Treaty of Alliance, cannot be *defended* againſt him that is *allied* without breach of the *Alliance*; therefore *Mediation* in ſuch caſes is the only hopes of the *oppreſſed*, which not having its effect, if the *oppreſſed* put themſelves into the protection of the *Mediator*, they then become in the nature of his Subjects, and then their *Prince* is obliged to their *ſuccour* and *defence*, even againſt his *Allies*, and this is by natural Right.

Liv. 3. Polybius *in excerptis Legationum* 35.

XXV. By the Laws of Leagues, though the Oath binds only the *Perſon*, yet the *Promiſe binds the Succeſſor*; for though ſome do hold, that Leagues do depend upon the Oath as their Firmament, though that is not ſo for the moſt part, yet the *efficacy* of ſuch Leagues reſts in the *promiſe itſelf*, to which for *Religion* ſake the Oath is added. Hence it is, that *Promiſes* made to a *Free-people* are in their nature *real*, becauſe the Subject is a *permanent matter*; although the State or Republick be changed into a *Monarchy*, yet the League remains, for that the body, *i. e.* the *power* is ſtill the ſame, though the Head be changed. And the Perſon is inſerted into the agreement, not that the agreement may be perſonal, but to ſhew *with whom it is made*; for if it be inſerted into the League that it ſhall be *perpetual*, or that it is made for the *good of the Kingdom*, or with the Perſon and his Succeſſors, or for a time limited, the ſame does moſt apparently demonſtrate the thing to be real.

When *Edward* the Fourth was chaſed out of the Kingdom, and *Henry* the Sixth was ſet up again; yet by Reaſon there was inſerted into the ſame theſe words, *With the King and Realm*, that the League did remain perpetual. *Phil. Comines lib.* 3. *cap.* 6. Ulpian. *Leg. Jure Gentium, ſect. pactum. D. pactis.*

Adde quæ Helvetiis cauſantur poſt mortem Hen. 3. *apud* Thuanum, *lib.* 97. *in An.* 1589. *Vide & inſignem locum apud* Cambden. *in Anno* 1572. *ubi de Fœdere antiquo Gall. & Scot.*

However, in all Leagues which tend to *Peace*, though there may remain ſomewhat, whereby words of ambiguity may ariſe; yet the moſt pious way of interpreting, hath been to account the ſame rather *real*, than *perſonal*; for all Leagues made for Peace or Commerce, admit of a

favourable

favourable conſtruction, *Leagues defenſive have more of favour, offenſive of burthen.*

XXVI. Leagues made with *Princes*, although they happen afterwards to be driven out of their Kingdoms by their Subjects, yet the League remains firm and good; for the *Right* of the Kingdom remains with ſuch an unfortunate Prince, notwithſtanding he hath loſt his Kingdom: The Preſident, Canon, and Plenipotentiary for the Duke of *Lorraine* at the Treaty of *Nimeguen*, renewed his inſtances with the *French* Ambaſſadors, that he might obtain ſome moderation of the Conditions that had been ſtipulated for his Maſter; the Emperor did the like, but without ſucceſs; however the Duke would not neglect any thing that might give the *French* King freſh Evidences of his deſire to merit the Favour of his Majeſty, he got Sir *Leoline Jenkins*, and the reſt of the Mediators, to declare to Monſieur *Colbert*, that the Emperor had taken into his Service all the *Lorraine* Forces; and in the publick Declaration which the Duke made at *Nimmeguen*, he ſaid, *That he had delivered all his Forces to a Prince at Peace with* France, *that he might make it appear to the King, that though he was expelled his own Dominion, yet he would do nothing that might give his Majeſty ground to deprive him of the honour of his favour:* And notwithſtanding all theſe moſt ſubmiſſive offers, this unfortunate but gallant Prince was ſhut out of that famous Treaty, which put an end to a War wherein almoſt all the Princes of *Europe* were engaged. On the other hand, Leagues made with the *Invader* cannot be good; for his cauſe being *unjuſt*, *is odious:* but if * the People will make him King *de facto*, and inveſt him, the queſtion is then out of all controverſy; for then he is become a King *regnant*, and by the Laws of *England*, if Treaſon be committed againſt his Perſon, and † after he is beaten out, and the King *de Jure* comes to his Crown, the King *de Jure* may puniſh thoſe Traytors with death.

Quintus ſaid to *Nabis*, We have made no Friendſhip nor Society with thee, but with *Pelops* the juſt and lawful King of the *Lacedæmonians*.

* 11 *H* 7. c. 1.

† 4 *E*. 4. 1. 9 *E*. 4. 12. 3. *Inſt. fol.* 7.

The Earl of *Warwick* having raiſed an Army in *France* and *Flanders*, invaded *England*, and within five or ſix days after his landing, King *Edward*'s Forces betraying him, the Earl became Maſter of the Realm; the King flying for protection to his Kinſman the Duke of *Burgundy*, he kindly in his misfortunes entertained him; yet while

Ed. 4. *in An*. 1470.

he was in this baniſhed eſtate, the Duke of *Burgundy* renewed the League with the *Engliſh*, it being agreed, that notwithſtanding King *Edward*'s misfortune, the League remained firm and inviolable between the Duke *Charles of Burgundy*, and the King and Realm of *England*: So that for *Edward* they ſhould name *Henry* (who was newly taken out of the *Tower* by the Earl of *Warwick*, at his chaſing out of King *Edward*). Now the true reaſon that Leagues remain, and are firm, notwithſtanding ſuch a change, is, becauſe there goes along with them a tacit condition, *viz.* of holding their poſſeſſions; and therefore the World wondred not, that *Charles* II. having ſworn a League with the King of *Spain*, expreſsly as he was King of *Portugal*, did notwithſtanding receive two *Ambaſſadors* from the then new King of *Portugal*; and that without being judged either in *England* or *Spain* to have broken his former Oath and League.

Phil. Cominus l. 3. c. 6.

Reges qui regnis exuti ſunt cum aliis regni bonis etiam jus legandi perdiderunt.

The Duke of *Guiſe* having formed the League againſt *Henry* the Third, which was, in regard the King was ſo cold in the Profeſſion of the *Romiſh Faith*, that it was in danger to be extinguiſhed by the increaſe which he permitted of the *Reformed* Religion, eſpecially ſeeing *Henry* the Fourth then King of *Navarre* was of that Religion, and was to ſucceed to the Crown; wherefore by the Mediation of *Philip* the Second of *Spain*, the *Pope* qualified the Duke of *Guiſe*, Head of that *Catholick League*, and (which in point of Government was to ſet him above the King) avowed him *Protector* of the *Catholick Faith* in the Kingdom of *France*. When *Henry* the Fourth ſucceeded to the Crown, then this League for ſecurity of Religion was moſt violent, and the *Spaniard* without, hoped, by nouriſhing thus the *diviſion* within, to carry all for himſelf at laſt. To avoid which gin, and to anſwer all, the King changed his Religion, and negotiated by *d'Oſſat*, to be received by the *Pope* as a dutiful Son of the *Church of Rome*, demanding abſolution for what was paſt, and making large promiſes of due obedience for the time to come. The King of *Spain*'s intereſt was, that he ſhould not be received, and thereupon he endeavoured to perſuade the *Pope*, that King *Henry* did but diſſemble with him, and that under this Diſguiſe he would eaſilieſt ruin the *Romiſh* Religion: Notwithſtanding this the Cardinal obtained his Reception,

Peter Matthew's Hiſtory of *France* in the Life of *Henry* III.

Reception, Abſolution, and Benediction, through the many Promiſes and Preſents which he made to *His Holineſs*; whereupon the *Spaniard*'s Deſigns were in a Moment all blown over from *France*, but fell heavily upon the *United Provinces*, which were ſorely oppreſſed, for that they apprehended the Loſs and Ruin of their Country; and thereupon they implored Aſſiſtance from King *Henry*, who received their Ambaſſadors very graciouſly, and gave them Aſſurance of Relief. The King of *Spain*, who wanted no good Intelligence in the Court of *France*, immediately remonſtrated to the *Pope*, That his former Intimations concerning *Henry*'s Diſſimulations, did now appear in the Face of all the World; and that ſeeing *His Holineſs* had been ſo credulous, he knew not now whether they ſhould be able to ſave the *Catholick Faith* from being ſubjected to the *Reformed* Religion or no: for whereas the *Hollanders* had revolted from him, only becauſe he reſolved to uſe the true Means for the Eſtabliſhment of the *Romiſh Faith* among them; and that now he was in a fair way of reducing them (which conduced ſo much (by *His Holineſs* his Opinion) to the Eſtabliſhment of the *Romiſh Faith*) *Henry* had taken their Party againſt him in that Work; and that at *Paris* he had received their Ambaſſadors to that Purpoſe, although he knew they were his lawful Subjects, *&c.*

This ſtartled the *Pope* not a little, who charged *d'Oſſat* for having betrayed him, and put the Church in Danger. This Argument was as ſubtile on the *Spaniard*'s ſide, as changing Religion was on King *Henry*'s; and therefore the *Cardinal* was not a little perplexed how to anſwer it to the Advantage of his Maſter; as alſo coherently to the Conſiderations of his former Reception into the Church: But at laſt he replied, That *His Holineſs* needed not wonder how in reaſon of State, thoſe different Religions might join together for political Ends, without Hazard of altering Religion. Thus *David* ſought Protection of the *Philiſtines*, and *Abraham* redeemed the ſinful *Sodomites*. That he took it to be upon the ſame Ground, that *His Holineſs* himſelf, not long before, received a *Perſian Ambaſſador*, who was ſo far from being a Heretick, that he never pretended to the Name of Chriſtian: That it was a plauſible Argument which the King of *Spain* uſed, in com-

Vide Peter Matthew's Hiſtory of *France in Vita Hen.* 4.

In Regno diviſo gens una, pro tempore quaſi duæ gentes habentur: And Princes are to have an Eye to the Power which each Kingdom hath to afford Benefit one to the other, and not to examine their Titles.

plaining of *Henry*'s receiving and avowing their Ambaſſador, eſpecially knowing at the ſame time that they were Rebels, and could pretend no Right or Title ſeparate from his Crown: "For Princes (quoth he) when Ambaſſadors "are addreſſed to them, never inform themſelves of the "Rights and Title of thoſe Princes from whom they are "ſent; but whether they have Poſſeſſion of the Force and "Power of thoſe Places from whence the Ambaſſadors "are employed; for it would be an endleſs Taſk, and "require an infallible true Hiſtory of the World (which is "not to be made by Man) if all the Ambaſſadors, be- "fore their Reception, ſhould be obliged, firſt to prove "clearly to the World, the juſt Right by which their "Maſters derive thoſe Titles and Juriſdictions which "they aſſume to themſelves."

Coke 3. *Inſtit. fol.* 155.

Grot. Lib. 2. *cap.* 15. §. 8, 9, 10.

XXVII. And as Leagues are Covenants or Agreements made by command of the higheſt Powers, wherein the Parties are bound over to the Divine Wrath, in caſe they break their Faith; it hath been a famous queſtion, Whether they may be entred into which thoſe that are Aliens from the true Religion, whereof by the Law of Nature there is no doubt nor difficulty; for that Law is ſo common to all Men, that it admits not any difference of Religion; but the queſtion is about the Law Divine, out of which it hath been diſcuſſed, not only by Divines, but famous Lawyers, as *Oldradus*, *Decianus*, *Grotius*; upon the whole they have agreed, that they may be entred into as well with Princes Infidels as Chriſtians: and that is evidently proved; for that before the Law of *Moſes* it was lawful to contract Leagues with Aliens from Religion for an inoffenſive and harmleſs behaviour, as that of *Jacob* with *Laban*: nor did the Law of *Moſes* make any change, the example of the *Egyptians* being expreſs in the point. 'Tis true thoſe ſeven Nations and other Kingdoms, as the *Amalekites*, that were deſtinated by Divine Sentence to be extirpated, were excepted; but Leagues of Commerce and ſuch as pertain to the utility of both Nations, or of either Party, are by the Law permitted with the profane. So *David* and *Solomon* made League with *Hiram* King of the *Tyrians*; and that which is very obſervable in the Sacred Hiſtory, of that Action it is ſaid, That the Alliance was made by *Solomon* according to the Wiſdom which God had

had given him. 'Tis very true, the *Jews* were generally very cautious of contracting with Idolatrous Princes, and the Reaſon was, for that they had expreſs Promiſes of Victory, but that was conditionally, *i. e.* if they kept the Law, which if performed, they had the leſs need of human Aid. But now under the Goſpel ſuch contracts have a more favourable Admittance, according to that of *Tertullian : So long as* Iſrael *only was his people, God did juſtly command mercy towards their Brethren alone; but after that he gave unto Chriſt the Nations for his Inheritance, and the Ends of the Earth for his poſſeſſion; and that began to be paid which was promiſed in* Hoſea, *They that were not my people ſhall be my people, and the Nations that had not obtain'd mercy ſhall obtain mercy; from that time Chriſt hath extended unto all the Law of Fraternal Benignity, excluding none from our compaſſion no more than from his Vocation*; and therefore as it is no evil to do good to the profane, ſo neither is it unlawful to implore their help, as *Paul* invoked the Aid of *Cæſar* and the Chief Captain; ſo that at this day there is no intrinſical or univerſal Pravity; nevertheleſs thoſe Alliances have their Circumſtances or Rules of Government, as not to join with them but in extreme neceſſity, according to that of * *Thucydides : They that are treacherouſly aſſaulted, as we are by the* Athenians, *are not to be blamed, if they ſeek for ſafety, and ſecure themſelves by the aid not of* Greeks *only, but* Barbarians.

Lib. 7. cap. 3. Horum exemplum ſecuti Imperatores & Reges Chriſtiani Fœdera, aut cum non Chriſtianis, aut cum non ſane Chriſtianis fecere, Conſtantius cum Gothis & Vandalis, Juſtinianus cum Longobardis, cum Saracenis Theodoſius, Honorius & cum Mauris Reges Hiſpaniæ, cum Tartaris Rodolphus Habſpurgenſis, Adde Johannem de Carthagena l. 3. de Jure Belli Romani Pontificis c. 1. Julius ſecundus Pontifex Turcis uſus, Vide Bulſtrod part. 3. fol 28. cited in *Marſhe*'s Caſe, the Caſe of *Samuel Pellagy* that had been Ambaſſador to the *States* of *Holland* to treat with them from the Emperor of *Morocco.*

* Famous was the Piety of *Emanuel* Duke of *Savoy*, who when he was able to take *Cyprus* by the aid of the Great *Turk*, refuſed it.

CHAP. VIII.

Of Alliances unequal, and of Protection.

I. *Of Alliances unequal, in reference to the acknowledging a Superiority or Protection in another.*
II. *Of Protections by a Prince or State voluntary or mercenary.*
III. *Of the Conveniences of ſuch Alliances, how conſidered.*
IV. *Of the Duty incumbent on the protected, and the obligation in Honour and Juſtice on the Protector.*
V. *Of Alliances unequal, and of the ordinary Cauſes that may tend to a Rupture of the ſame.*
VI. *Of the Cauſes extraordinary that may occaſion the Breach of ſuch Alliances.*
VII. *Of Faith and Aſſurance implicitly diſcharged by the delivering of Hoſtages.*
VIII. *Of the Differences of Leagues contracted by Princes, through force or fear, differing from Contracts private.*
IX. *Of Ambiguity in words, how it hath given occaſion to Princes to depart from the League, and of the Reputation of Princes on ſuch occaſion preſerving the Alliance.*
X. *Of the Firmneſs and Aſſurance of Alliances, whether to be found more in* Princes, *or in* Republicks.
XI. *If one Party hath violated the League, whether it be lawful for the other to depart from the ſame.*
XII. *In the Conſtruction of Leagues, the Thoughts not the Words of Princes to be conſidered.*
XIII. *Of things tacitly excepted in all Leagues and Treaties, in reference to their nullity.*
XIV. *Of things favourable, things odious, and others of a mixt nature to be uſed in the interpreting of Leagues.*

I. UNequal Alliance is that which is contracted betwixt Princes or States *unequal* in *Honour*, or in *Power*, with unequal Conditions, the acknowledging the other, *not for Maſter or Lord*, but by Honour as the more powerful, and the better qualified, and ſome for *Protector*; and theſe Treaties are made with thoſe States, which take or give *Penſion*, or which put themſelves into *Protection*. And ſuch was the League of * Protection propounded to Queen *Elizabeth* by the *States-General* of the *United Provinces*, who by *Joos Van Menin* moſt humbly beſought Her to accept of the Sovereignty and Supreme Dominion over the ſaid *United Provinces* upon certain and reaſonable Conditions and Articles, *&c.*

'*Andronicus Rhodius poſt Ariſtotelem, amicitiæ inter partes hoc ait proprium, ut potentiori plus honoris, infirmiori plus auxilii deferatur.* Grot. *lib.* 1. *c.* 2. §. 21. *n.* 2. It is the property of Friendſhip 'twixt unequals, that the

Tribute

ſtronger have more Honour, and the weaker have more Help: *Proculus* adds that ſuch a Clauſe is inſerted in the League, to ſignify the one is ſuperior in Authority and Dignity, for both are free, but are *ſub patricinio, non ſub ditione. Liv. lib.* 37. *Cicero Offic.* 2.

* *Non ſine metu in poſterum, quem tunc præſens neceſſitas averterat.* Grotius *Annal. lib.* 5. *A. E. Miteran. lib.* 13. *ad An.* 1585. *Grimſton, lib.* 12. *ad An.* 1585.

Tribute is paid by the *Subject*, or by him, who, to enjoy his liberty, pays that which is agreed upon to him that hath forced him to do it. But a *Penſion* is held voluntary from him that is in *Protection*, or from him that is in all other things *equal* to the *Treaty* of *Alliance* to hinder the *Penſioners* that he join not with the Enemy, as the *Swiſs* to the *French*, or to have Aid and Succours from him.

II. But that *Protection* is moſt true and honourable, when a Prince or *Republick* takes upon him the defence of another, *freely without Reward*; though ſome, if not all, find it moſt neceſſary to balance Honour with Profit, from this Maxim, that *A pecuniary intereſt obliges more to ſuccour, than when barely obliged by Oath.* *Leg. non dubito D. de Cap.*

III. Again there ſeems to be a kind of *Protection* or an Alliance, which indeed is no more than a bare pecuniary retaining. Politicians have conſidered the Subject diverſly, either Abſolute or Conditional; Abſolute is that which is meaſured by the concurrence of the greatneſs of Forces, Treaſure, Munitions, and other Military Preparations: Conditional is that, the which although it be leſs than an abſolute, yet is more fit to ſuccour us or do us Harm: In this the Neighbourhood is of very great conſideration; for that a Neighbour Prince of mean Forces may more eaſily hurt or ſuccour us, than a great Prince that lies far off; near Succours are always ſooner ready and with leſs Charge. And this makes the Biſhop of *Munſter* to be in that eſteem with the *States of Holland* and the other Sovereign Princes bordering on his Territory; and the Reaſon why he is ſo much the more courted into Aſſiſtance and Friendſhip is, for that his Forces being at hand, if Peace be concluded, he is the more eaſily diſpatched, whereas remote and abſolute Princes their ſuccours come often too late after the Occaſions to defend us, and too ſoon to oppreſs us.

IV. By the Law of *Protection*, he that is protected owes all *Reſpect* and *Honour* to his *Protector*, againſt whom if he conſpire or attempt, or ſtrays from his duty, it is lawful for the Protector to make *better aſſurance*; nay, if he pleaſes, to make himſelf *Maſter*: But then on the other ſide, the Protector ought to defend and ſuccour the protected, and uſe him well; for otherwiſe, he may withdraw himſelf from the Protection, and ſeek another.

The *Genoeſes* having put themſelves in the protection of the *French* King, revolted; he thereupon changed their Conditions into Priviledges, to the end it might be his Will to deprive them when he ſhould think fit. *Vide Cardinal. Thuſc. P. P. Concl.* 935.

V. In Alliances that are unequal, there are four kinds of Controverſies may happen.

Firſt, If the Subjects of a Prince or Republick, that is under the Protection of another have committed any thing *againſt the League*.

Secondly, If the Prince or Republick be accuſed.

Thirdly, If the Fellows, which are under the protection of the ſame *Prince* or *Republick*, contend with one another.

Fourthly, If the Subjects complain of their own Ruler.

To the *firſt*, if a Fault appears, the Prince or Republick is bound either to puniſh the Offender, or to render him unto the Party injured, and ſee or endeavour that Damages may be recovered.

But one of the *Aſſociates* in the League hath no Right to apprehend or puniſh the Subjects of his Confederate.

To the *ſecond*, the *Confederate* hath a Right to compel his Confederate to ſtand to the League, and if he will not, to puniſh him, for that one may take ſatisfaction or revenge of him that hath offended; and this happens as well amongſt thoſe that have no Confederation at all.

To the *Third*, as in Confederacies equal, the Controverſies are wont generally to be brought before an *Aſſembly* of the Confederates, that is to ſay, ſuch as are *not concerned* in the Queſtion, or elſe before *Arbitrators*, or elſe before the *Prince* of the *Aſſociation*, as a Common Arbitrator.

This holds as well between Leagues equal as unequal. Grotius *de Jure Belli ac Pacis, l.* 1. *c.* 3. §. 21.

This hath the ſame Right in Leagues that are equal: *Nam ut quis ultionem ſumat ab eo qui peccavit, ſatis eſt ut ipſe ei qui peccavit ſubditus non ſit.* Grot. *de Jure Belli, l.* 1. *c.* 3. §. 21. *n.* 5. But that proves not any power of commanding, for Princes do uſually try their cauſes before Judges of their own chuſing *Eod. l.* 1. *c.* 3. §. 21. *n.* 6. *Decet*

So

So on the other hand in a *League unequal*, it is agreed for the moſt part, that the Controverſies be debated before him who is *Superior in the League*.

To the laſt, the *Confederates* have no *Cognizance*. In common Affairs out of time of Aſſembly, even where the *League* is equal, the Cuſtom is for him who is choſe *Chief of the League*, to have Command over the Confederates, according to the Speech of the *Corinthians* in *Thucydides*, *It becomes them that are Princes of the League, not to ſeek their own particular advantage, but to content themſelves with an Eminency above the reſt, in taking care of the common Intereſt.*

eos qui Fœderis Principes ſunt, circa ſuas quidem utilitates nihil præcipuum ſumere; at in communibus rebus curandis eminere ſupra cæteros. In Orat. Corinthiorum.

VI. Though that the Breach of Faith be much practiſed in ſuch Affairs, yet there are few Princes found which have not found a *pretext*; ſome have pretended to be circumvented by error; others by Change of Affairs have have pleaded an excuſe, as great Wrongs or inevitable Loſs, and apparent danger of the ruin of their *States*, which are the Cauſes, wherein ſome ſay, that *an Oath is not obligatory*; the Condition, by reaſon of the Oath, being impoſſible or unjuſt; to theſe Limitations, ſome hold they muſt not keep faith with an *Enemy of the Faith*, nor with him that hath broken his, nor with a Subject, nor with a *Thief* or *Pirate*; certainly if it be not lawful for a Man in theſe caſes to keep *Faith*, it is not lawful to give it: If it be lawful to capitulate with ſuch Men, it is neceſſary to hold what we promiſe, that is, (we preſume) when the word is given by him that may give it, and that they rely upon it.

Oldrad.Conſ.1.

Gregorius, *Perjurium Deo culpam impingit negligentiæ.*

VII. If *Hoſtages* are taken, he that gives them is *freed from his Faith*; for that in receiving *Hoſtages*, he that receives them hath relinquiſhed the aſſurance which he hath in the Faith of him that gave them; ſo where a *Captain* for his *Prince* gives his Word without *Commiſſion* it binds not the *Prince*.

VIII. Some Lawyers would judge of *Treaties* as particular *Contracts*, by which means they would ſtretch the Conſciences of *Princes*; for, ſay they, that as a private Man is not bound by that which he hath promiſed by *force* or *fear*, ſo it ought to take place amongſt *Princes* and in Treaties which are made betwixt Sovereigns; but that is ridiculous, for that were in effect to baniſh *Faith* from all

publick

publick Negotiations; for there is no Treaty but what is uſually made in *Arms* by *force*, or through *fear* to loſe either Life or Goods, or Liberty, or the *State*; which are cauſes of *juſt fear*, and may ſhake the moſt conſtant.

Upon the words *Ewing* and *Enig.* to retain the *Landgrave of Heſſe.*

IX. Some Princes deſirous to ſhew themſelves more *irreligious* in theſe Ruptures, have taken ſubject and occaſion upon the *Ambiguity* of ſome Clauſes in the *Treaty*, or upon *Equivocation*, as *Charles the Fifth did*; or elſe they ſeek other Occaſions, as attempting againſt thoſe whom their Ally is bound to defend, to the end that drawing him into the field, *he may lay the cauſe of the Rupture on him.*

But Princes, who reſpect ſuch Treaties with a pious Intention of preſerving them, always remain conſtant and firm; and though occaſion may offer itſelf, by which they might get *advantage* by the Breach; yet when they remain durable, ſuch reſpect is afterwards had to their Word and Honour, that fewer and leſſer ſecurities will be demanded of them, than one *whoſe Faith is doubted.*

Famous was the Anſwer of the *Carthaginian* Senate to the *Romans* upon the aſſaulting of *Saguntum*: Whether *Saguntum* was aſſaulted by private or publick Council, we conceive it not to be made the Queſtion; but this, whether it was aſſaulted juſtly or unjuſtly; for to ourſelves an Account is to be

X. But Aſſurances in caſes of this Nature have been found more in *Republicks* than in *Princes*; for though Republicks have the ſame Mind, and the ſame *intentions* as Princes, yet for that they move but ſlowly, it will cauſe them to ſtay longer in reſolving. Famous is that of the *Athenians*, when *Themiſtocles* in his Oration told them, That he could diſcover a Matter in which the *Athenians* would reap great Advantages, but he could not tell it, for fear the Diſcovery would take away the Opportunity of atchieving it: whereupon the *Athenians* deputed *Ariſtides*, to whom he ſhould communicate the Secret, and with him ſhould conſult about the obtaining it: They meeting, *Themiſtocles* demonſtrated that it was in the Power of the *Athenians* to make themſelves Maſters of all *Greece*, for the *Grecian* Naval Army was then in their Ports and Protection; whereupon *Ariſtides* replied, *The ſame was a Breach of Faith*: But it was anſwered, *It being for the publick, all conſiderations of that kind ought to be laid aſide*; whereupon *Ariſtides* being called by the People to give Report, told them, *Themiſtocles's advice was exceeding profitable, but diſhoneſt*, for which cauſe the People wholly refuſed it.

given by our Citizens, whether it did it of itſelf, or by Commiſſion; with you this alone is diſputable, whether it were a violation of the League, or no. *Livy B.* 31.

XI. If one party has violated the League, the other may moſt certainly depart from it; for the Tranſgreſſion of the Articles, be it never ſo little, makes a *Breach* of the *Agreement*, unleſs it be *otherwiſe* prevented by *Condition*, which may be, by inſerting into the ſame, * *that for every Offence it may not be lawful to depart from the League.* * Grot. *l.* 2. *c.* 15. §. 15.

XII. In all *Leagues*, the Thoughts of Princes and States are to be conſidered, not what they ſaid; yet becauſe internal acts are not viſible by themſelves, it is neceſſary that ſomewhat certain ſhould be determined, *i. e.* reduc'd to *Heads* or *Writings*, otherwiſe there would be no Obligation at all, for then every one might free himſelf by affixing on his own Words what Senſe he pleaſes. Hence it is, that by the Dictates of *Natural Reaſon*, he to whom any thing is promiſed, hath a Right to compel the Promiſer to that which right *Interpretation* ſuggeſteth, for otherwiſe the matter would have no End. And as the reducing of the Treaties into Writing makes the Agreements plain and obvious, ſo the mutual Advance of the Miniſters proportionably haſtens the Accompliſhment. The Counts *Avaux* and *Servient*, being appointed for the Treaty at *Munſter*, as they paſſed through *Holland*, they entered into a Confederacy with thoſe States, wherein each Party reciprocally did bind themſelves by Articles, not only not to treat of any thing without the Aſſent and Participation of the other Collegue, but that the Treaty ſhould be carried on ſo equally, as if one of the Parties ſhould ſee the other's Buſineſs advance further than his, it ſhould be lawful for the one to deſire the other to proceed no further, till his Affairs were equally advanced: which Articles bounding the Approaches of each other, ſoon haſtened the End of that tedious Treaty. *In fide quid ſenſeris, non quid dixeris cogitandum.* Cic. de Offic. 1. *Monmouth's* Hiſtory of *France, fol.* 28.

XIII. Again, in all Leagues and Treaties for Peace, there is this Exception to be ſuppoſed in the Contractors, unleſs ſome new Cauſe intervene, or unleſs it be by the default *Qui promittit non offendere, is ſubintelligit exceptionem— Niſi cauſa ſu-*

pervoniat, niſi culpa acceſſerit ejus cui promiſſio iſta ſit, & pactio fœderis, rebus ſic ſtantibus. Alber. Gentil. de Jure Belli, *l.* 3. *c.* 24.

default of him with whom the League and Compact is made, or Affairs continuing in the ſame poſture and ſtate in which they were at the Time of the Contract: and that Saying of *Ulpianus* and *Pomponius* concerning private Compacts, *viz. That an Agreement is not violated from which a Man recedes upon a juſt reaſon and motive*; is by Interpreters extended to National Leagues betwixt Princes and States.

XIV. In the *Interpretation* of Leagues and Truces, there ought to be a very great Care had, in regard of the *Sacredneſs* of them; therefore in things promiſed or ſecured by ſuch Leagues, ſome are favourable, ſome odious, ſome mixt, or of a middle Nature. Thoſe that are moſt favourable, are thoſe whoſe Words tend to Peace, not to War, whoſe Footſteps leave ever behind the deep Impreſſions of Miſery, Devaſtation, and Poverty, but more eſpecially when ſuch Leagues are made for *War Defenſive* than otherwiſe; but thoſe are called *odious*, which *burden* or *oppreſs* one part only, or one more than the other, and likewiſe ſuch as tend to matter of *Revenge* or *Puniſhment*, or to violate ſome former acts or obligations, *or the bringing in a change or innovation of what hath been conſtantly ſettled, and uſed before.* Mixt, as where a Change is propounded; but that is with the Siſters of *Moderation* and *Peace*, which are proportionably good, according as the Change may be eſteemed.——Therefore the Standard Rule is, *That in Leagues and Treaties* not odious, *the Words are to be taken according to the full extent and propriety of popular uſe; and if there be more Significations, the largeſt is beſt:* On the other hand we are not to recur to Significations plainly improper, unleſs otherwiſe ſome abſurdity or inutility of the Agreement would follow. Again, Words are to be taken ever more ſtrictly than propriety ſuffers, if it be neceſſary for the avoiding of *inequity* or *abſurdity*. But if there be not ſuch neceſſity, *manifeſt equity* or *utility* in the Reſtriction, we are to ſtay them within the narroweſt Bounds of Propriety, unleſs the Circumſtances diſſuade. On the other Hand in *Leagues* or *Promiſes odious*, even a figurative Speech is admitted to avoid the *Odium*, or burden; therefore in *Donation*, *Remiſſion* of one's *Right*, *Dominion*, or *Property*, they

In L. non poſſint. D. de Legibus.

Vide exemplum in L. cum virum C. de fidei commiſſis.

they are always to be conſtrued to thoſe things which were probably thought on, and really intended. So Aids and Succours promiſed from one part only, is to be underſtood to be due at the *Charges of him who ſhall acquire them.* Grotius *lib.* 1. *cap.* 16. §. 12.

CHAP. IX.

Of Treaties of Truce, Neutrality, and Peace.

I. *Of Treaties, the various ſorts.*
II. *Of Rules in Caſes doubtful.*
III. *Of Truces amounting to a Peace.*
IV. *Of the Advantages between Treaties of Truce and Peace.*
V. *When promoted.*
VI. *Whether it can prejudice the Pretenſions of the Principal.*
VII. *How preſerved and puniſhed by the Laws of* England.
VIII. *Of Treaties of Neutrality, the various Sorts.*
IX. *Of the Advantages of the ſame.*
X. *In Caſes of Neceſſity where he ought to declare, and for whom.*

I. T*Reaties* are either with *Enemies* or *Friends*, or with Perſons which deſire to continue *Neuters* with us, or we with them.

The Treaties which are made with our *Enemies* are either for *a time*, or *perpetual.*

Perpetual, as the Peace that is made to compoſe all differences, and the War that is undertaken for *Conqueſt*, or for *Reparation* of Injuries, or to *reſtore* the *Commerce.*

Treaties, which are made for a time with our Enemies, are called *Truces*; the which are either *general*, for all the States of the one or the other Prince, for all Perſons, and for all ſorts of *Commerce*: Or elſe they are *particular*, for certain *Places*, for certain *Perſons*, and for the *Commerce*, and ſometimes no further than a bare ſuſpenſion of Arms.

Truce, what it is.

A Truce is an Agreement, whereby though the War continue, yet all Acts of Hoſtility do for a while ceaſe; for between War and Peace there is no Medium, it is, and may be called a War, tho' at preſent its Operations are intermitted. An Habit may be, tho' at preſent it doth not operate. A Man may be ſaid to be wiſe or

at the requeſt of the Lords and Commons was pardoned, he making ſatisfaction for the loſs †. Generally all Leagues and Safe-Conducts are, or ought to be of *Record*, that is, they ought to be *Inrolled in the Chancery*, to the end the Subject may know who are in Amity with the King, and who not; who be Enemies and can have no Action here, and who in League, and may have Actions perſonal here.

† *Ad Parliam. tent. quinden. Hill. Vide* Cotton Abridgment. 19 *E.* 4. 6. *B.* 15 *H.* 6. *c.* 3. 18 *H.* 6. *c.* 8. 20 *H.* 6. *c.* 1. 14 *E.* 4. *c.* 4.

19 *E.* 4. 6. *B.* Sometimes they have been inrolled in the *Wardrobe*, as being matters of State.

Maxim. Note, *In all Treaties, the power of the one party, and the other, ought to be equal; nor are they to be held firm till ratified.*

Rott. Scotiæ de Anno. 10 *E.* 3. *m.* 36. *intus, de puniendo illos qui contra formam Treugæ hominibus de Scotia conceſſa deliquerint.*

Before the Statute, when any breach of Truces or Leagues happened, or was occaſioned by the miſdemeanors of any of the King of *England*'s Subjects, there did uſually iſſue forth Commiſſions under the *Great Seal* of *England*, to inquire of the Infringers of the ſame, and to puniſh and award Satisfaction to the injured.

VIII. *Princes* who neither love nor hate any thing abſolutely, ſeem generally inclined to *Neutrality*, and in that govern themſelves in their Friendſhips according to their Intereſts; and *Reaſon of State*, in effect, is no other but *Reaſon of Intereſt*.

Neutrality may be of two ſorts; the one with *Alliance with either part*, the other *without Alliance*, or ſo much as the leaſt Tye to the one or other, which is that which properly may be called *Neutrality*.

The firſt is governed by the *Treaty of Neutrality*, the latter by the *Diſcretion of the Neuter Prince*, whoſe Carriage ought always to be ſuch, as that he may not give the leaſt glimpſe of inclining more to one than to another.

IX. The Advantages of Neutrality are, that the Neuter Prince or Republick is honoured and reſpected of both Parties, and by the fear of his declaring againſt one of them, he remains Arbitrator of others; and Maſter of himſelf.

And as a Neuter neither purchaſes Friends, nor *frees himſelf from Enemies*; ſo commonly he proves a Prey to the Victor; hence it is held more advantage *to hazard in a Conqueſt with a Companion, than to remain in a State wherein*

wherein he is in all probability of being ruined by the one or the other.

But Princes that are *powerful*, have uſed generally to preſerve a *Neutrality*; for whilſt Petty Princes and States ruin themſelves by War, he fortifies himſelf with *means*, and, in the end, may make himſelf Judge of their Differences.

On the other hand it hath been conceived that Republicks that are weak, what part ſoever they take, it will be dangerous to them, eſpecially if they are in the midſt of two more powerful States than themſelves; but experience hath made it appear to the contrary, that *Neutrality* is more beneficial to a *weak Prince* or *Republick*, ſo that they that are at War be not barbarous or inhuman. For although a Neutrality does not pleaſe either Party, yet in effect it wrongs no Man; and as he doth not ſerve, ſo he does not hurt: beſides his Declaration is reſerved till the Iſſue of the War, by which means he is not obliged, by ſiding with either party, to gain or loſe by the War.

Much practiſed by the Princes of the *Empire* and petty States.

X. But if the Neuter be preſt by Neceſſity to declare himſelf, he muſt do it *for the moſt powerful* of the two Parties, following that *Roman* Maxim, *That either they muſt make themſelves the ſtrongeſt, or be a Friend to the ſtrongeſt*: So they of *Strasbourg* * declared for the Empire againſt the *French*. On the other hand, if the Neuter ſees, that joining to the weaker, will balance the Power of the ſtronger, and by this Counterpoiſe reduce them to Reaſon; the ſame hath been generally followed, upon the Maxim, *That the ſafety of States conſiſts in an equal counterpoiſe of the one, and the other; for as the greatneſs and opulency of a Prince draws after it the Ruin of their Neighbours, it is wiſdom to prevent it.*

* *Anno* 1674. *Conſul Quintus ad Achæos, quod optimum eſſe dicant non interponi vos bello: imo nihil tam alienum rebus veſtris eſt: Quippe ſine gratia vel dignitate præmium victoris eritis. Lucius lib.* 35. *Scripta Ammirat. diſc. polit. l.* 18.

CHAP. X.

Of the Immunities and Privileges of Ambaſſadors, and other publick Miniſters of State.

I. *Of the Function of Ambaſſadors and Agents generally conſidered.*
II. *Of the Difference between Ordinary and Extraordinary.*
III. *Of the Qualifications and Matters requiſite to be in ſuch.*
IV. *Whether any but Sovereign Princes and States may qualify ſuch, and who may not.*
V. *Of the Right of Ambaſſadors, how ſecured by the Laws Divine, and of Nations.*
VI. *Of Precaution, whether the ſame may be given to ſuch not to come, and attempting againſt ſuch interdiction, how to be dealt with; and of the puniſhment of thoſe that ſhall violate them, by the Laws of* England.
VII. *How Princes and States may govern themſelves in reference to their Reception or Refuſal.*
VIII. *Whether Ambaſſadors may be ſubjected to Puniſhment when they offend againſt the Laws of Nations.*
IX. *Of proceeding againſt them by Princes and Republicks at this day, according to the Laws of Nations.*
X. *Whether privileged in that State or Country thro' which they paſs without leave; and of the various Proceedings againſt them by ſeveral Princes and States, illuſtrated in Precedents and Examples.*
XI. *Of proceeding againſt them according to the Laws of* England.
XII. *Where they forfeit their Privilege, according to the Laws of* England, *in things Capital.*
XIII. *Where preſerved in Matters ordinary not* malum in ſe.
XIV. *The Office of a publick Miniſter, what it includes in Matters Civil for the King and Nation whom they repreſent.*
XV. *Whether the Houſe of an Ambaſſador can be a Sanctuary to offenders, or that he may exerciſe Royal Juriſdiction over his own Domeſticks and Vaſſals.*
XVI. *Whether the Goods of an Ambaſſador are ſubject to ſeizure for Debts contracted by himſelf.*
XVII. *Outrages committed by Ambaſſadors, where a Forfeiture of their privilege.*
XVIII. *Of puniſhment on thoſe that ſhall offer Violence to their perſons.*
XIX. *Obſervations touching the Immunities and Governments of the publick Miniſters of* Venice.
XX. *How introduced by the Laws of Nations.*
XXI. *Wars whether juſt for Violation done to publick Miniſters.*

Coke 4. *Inſtit. fol.* 153. Agents are

I. AN *Ambaſſador* and *Agent* is the ſame thing, if we conſider only the Function of their Charges: only in this they differ; an *Agent* hath charge to repreſent

ſent the *Affairs* only; but an *Ambaſſador* ought to repreſent the *Greatneſs of his Maſter, and his Affairs.*

generally uſed when there is ſome Suſpicion that the Ambaſſador will not be honoured as he ſhould be; therefore the *French* Kings of late Years have no Ambaſſadors in the *Emperor*'s Court, but Agents, becauſe of the Competition for Precedence betwixt him and *Spain*.

II. Ambaſſadors are in two Capacities, either Ordinary or Extraordinary: The Ordinary or Lieger Ambaſſadors, are thoſe who are commanded to reſide in the Place whither ſent, unleſs they receive Letters of Revocation; and as the time of their Return is indefinite, ſo their Buſineſs is uncertain, ariſing out of emergent Occaſions, and commonly the Protection and Affairs of the Merchants, is their greateſt Care. The Extraordinary or *pro tempore* are thoſe that are employed upon ſome particular great Affairs, or Condolements, or Congratulations, or for Overtures of Marriage, *&c.* Their Equipage is generally very magnificent and illuſtrious, and they may return without requeſting of Leave, unleſs there be a reſtraining Clauſe in their Commiſſion.

III. An Ambaſſador or Agent ought to be converſant in all ſorts of Hiſtory, reading with Judgment, and weighing all the Circumſtances of Action which are there repreſented, by which he will be qualified to know (but eſpecially of that Country whither he is ſent)

1. The Eſtabliſhment of Eſtates.
2. The Rights of Limits.
3. The Genealogies of Princes.
4. The Pretenſions of Kings upon the Eſtates of others.
5. Their Forces, Means, Alliances, and manner of living. Perſonally he muſt be

1. Reſolute and Couragious in that which he hath wiſely deliberated.
2. Secret in Affairs of Importance.
3. Diſcreet in his Speech.
4. No Detractor or Evil Speaker of any King or State, but more eſpecially of him or them with whom he remains.

5. One that will ſpeak freely of his Maſter's Pretenſions, if there be a Queſtion to maintain them.

The Trumpeter that brought the Letters from the Maid of *Orleans* to the Earl of *Suffolk* was burnt; and the Reaſon of that was, becauſe he came from no lawful Prince, nor one commiſſionated, or capable of ſending a Trumpeter. *Grimſton*'s Hiſtory of *France*, *fol.* 326.

IV. By the Laws of Nations, none under the Degree of a Sovereign Prince can nominate or ſend any in that Quality; nor can any Subject ſend or receive any Ambaſſador, be he never ſo Great; if a Viceroy doth it, it is no leſs than High Treaſon; and ſo it was declared when the *Scots*, *inconſulto Principe*, ſent *Lowden* and others in Quality of private clancular Commiſſioners, to treat with the *French* King *Lewis* the Thirteenth, in the Name of the whole Nation for Aſſiſtance, the King would not admit or hear them. So did Queen *Elizabeth* when *Chriſtopher Aſſonville* came into *England* in Quality of a Miniſter of State, ſent from the Duke of *Alva* then Governor of *Flanders*, ſhe refuſed to admit him, he not having any Commiſſion or Credentials from the King of *Spain*. 'Tis true, the Electors and Princes of *Germany* have obtained the Privilege of ſending, and the Reception of Ambaſſadors, * but that is limited only to Matters touching their own Territories, and not the State of the Empire. And ſo likewiſe the *Hans* Towns may do the ſame; for they claim the like Privilege, they being free Imperial Cities, and partake of the ſame Regalia's, either by Preſcription or by Grants from former Emperors, whoſe Neceſſities enforced them to part with ſuch Royal Flowers of the Empire; and generally they † ſend for their Ambaſſadors always two Perſons, one of great Birth, and that hath been a Soldier, to maintain Decency; and the other a Doctor or Lawyer, to regulate Affairs with Learning, and by the Pen.

* That the *German* Princes may have ſuch a Prerogative, but it is *ſecundario tantum jure. Et qui jus mittendorum Legatorum ſecundario tantum jure habent, mittantur Legati non de Rebus univerſum concernentibus Imperium, ſed tantum ſui Territorii ratione; eo enim ipſis intuitu tantum datum, ultra igitur terminos non eſt procedendum, fieret enim alias præjudicium Imperatori, &c. Kirknerus* §. 25. Memorable was that of the *Switzers*, who ſent a Meſſage to the *French* King, that he ſhould not ſend them an Ambaſſador with ſtore of Words, but a Treaſurer with Plenty of Money.

† *Monmouth*'s Hiſtory of *France*, *fol.* 27, 28.

Pompon. Leg. ſi quis D. de Legationibus.

V. The Right of Ambaſſadors is ſecured both by the Safeguard of Men, and alſo by the Protection of the *Law Divine*; therefore to violate this, is not only *unjuſt*, but *impious* too: And as *Protection* is given to the *Legates* of Supreme *Rulers* by the *Laws of Nations*; ſo by the *Civil Law* there is a Protection likewiſe for *Provincial Legates*,

gates, *Heralds*, and *Conſuls*. This Right of Legation was originally provided, ſaith *Livy*, for a *Foreigner*, not a *Citizen*; yet in Civil Wars, Neceſſity ſometimes makes Place for this Right beſides the Rule, as when the People are ſo divided into equal Parts, that it is doubtful on which Side the Right of Empire lieth, as that unhappy Spot of *Flanders*; or when the Right being much controverted, two contend for the Succeſſion to the *Throne*; for in this Caſe one Nation is reckoned as two; and ſo was the State of *England*, when the *Houſes* of *York* and *Lancaſter contended* for the *Crown*, properly then called Commiſſioners: Nay, this Right of *Legation* hath been ſo preſerved, that the very Meſſengers of Rebels have been protected, as were thoſe of *Holland* by *Philip* of *Spain*. So great a Reſpect have Nations had in all times to ſuch Men, that even * *Traitors*, nay *Pirates* and *Robbers*, who make not a Society, nor have any Protection by the *Law of Nations*, and with whom neither Faith nor Oath (as ſome conceive) may be kept, Faith being given them, obtain the Right of *Legation*, as once the Fugitives in the *Pyrenean Foreſt* did.

Liv. lib. 16.

Kings conquered in a ſolemn War, and deprived of their Kingdom, with other Royalties, loſe the Right of Legation. *P. Æmilius* detained the Heralds of *Perſeus*, whom he conquer'd.

* *C. Poole* a Traitor fled to *Rome*; the *Pope* ſent him Ambaſſador to the *French* King, of whom the King of *England* demands his Subject, *ſed non prævaluit*. *Coke Inſtit.* 4. *fol.* 153.

VI. *Ambaſſadors* may by a *Precaution* be warned not to come; if they dare, they ſhall be taken for Enemies; but once admitted even with Enemies in Arms, much more with Enemies not in actual Hoſtility, have the Protection and Safe-guard of the Laws of Nations; and therefore their Quality being admitted by Safe-conduct, they are to be preſerved as Princes; and ſo it was declared in *Parliament*, where the killing of *John Imperial*, Ambaſſador from the States of *Genoa*, was High-Treaſon, *Crimen læſæ Majeſtatis*.

Lucas's Rep. 4. 5.

Rot. Pat. 3. *R.* 3. *num.* 18.

† So likewiſe of *A. de Walton*, the King's Ambaſſador, *Nuncium Domini Regis miſſum ad mandatum Regis exequendum*, who was murdered by one *John Hill*, which Offence was adjudged High-Treaſon, and accordingly he was drawn, hang'd, and beheaded.

† *Legatus ejus vice fungitur à quo deſtinatur, & honorandus eſt ſicut ille cujus vicem gerit, & Legatos violare contra jus Gentium eſt*, 22. *Aſſize pl.* 49. *Note*, This was three

Years before the making of the Statute of 25. *E.* 3. *quære* if ſuch a *Prorex* is within the Statute at this Day.

Qui violarit Legatum, Lege Julia de vi publica tenetur.

And by the *Julian* Law, he that violates Ambaſſadors is guilty of publick Violence; that is of proſtituted Faith of publick Authority, and of a Breach of the Laws of Nations: And by the *Pontifical* Law, it is no leſs than a Piacle, and to be interdicted from the Benefit of holy things. *Philomela* ſung a fatal *Requiem* for the bloody Entertainment which ſhe gave the Ambaſſadors of *Frederick Barbaroſſa*, the Emperor having ſent them to treat in order to Peace; but they inſtead of that avowed the Action of thoſe that murdered his Ambaſſadors: The offended Emperor having taken the City, razed it to the Ground, and executed all the People therein as Rebels and Traitors againſt the Laws of Nations.

Fuller's Holy War, *l.* 3. *c.* 4.

VII. On the other Hand, Ambaſſadors may not always be received, though they ought never to be rejected without Cauſe; for there may be Cauſe from him from whom they come, as the *Roman Senate* would not admit of the Embaſſage of the *Carthaginian*, whoſe Army was then in *Italy*; the King of *Spain*, thoſe of *Holland*; and the then *Pope*, the Ambaſſador of *Henry* the Second after the Murder of *Becket* Archbiſhop of *Canterbury*: So likewiſe from the very Perſons that are ſent, as *Theodorus* the *Atheiſt*, whom *Lyſimachus* would not give Audience to; and Mr *Oliver*, *Lewis* the Eleventh's Barber, whom they of *Gaunt* refuſed: Yet *Matthæus Palmerius*, an Apothecary of *Florence*, had better Fortune than the *French* Barber; for he being ſent in Quality of Ambaſſador to *Alphonſo* King of *Naples*, and having acquitted himſelf elegantly, and with much Generoſity at his firſt Audience, the King having Information that he was an Apothecary, ſaid, *Se tali ſono gli ſpeciali di Fierenze, quali debbono eſſere gli Medici? If the Apothecaries of* Florence *are ſuch, what ſhall we think of their Phyſicians?*

Camden 1571. *Daniel's* Hiſtory of *Henry* 2. *Carolus quintus Imper. Galliæ, Venetorum, & Florentinorum ad bellum ſibi indicendum miſſos deduci juſſit in locum qui à comitatu ſuo abeſſet, triginta millia-ria. Guic. l.* 18. *Bellaius l.* 3.

So likewiſe where the Cauſe of ſending is ſuſpected, in reference to diſturb the People, or with Intentions rather to ſow Sedition, than to conclude a Peace (if ſuch be their Errand) or not honourable, or unſeaſonable. As for thoſe aſſiduous Legations which are now in uſe, they may with very good Right be rejected; for the no Neceſſity of them

appears

appears by the antient Cuſtom whereto they are unknown, which made *Henry* the Seventh admit of none.

Bacon's H. VII.

The *Venetian* having admitted *Henry* the Fourth of *France* his Ambaſſador, yet thay interdicted him * to come with the other Ambaſſador to the *Chapel*, till the King was reconciled to the *Church of* Rome.

* *Card. Arnold. Oſſat* in his 353 Epiſtle. *Coke* 4. *Inſtit. fol.* 153.

VIII. By the Laws of Nations, only unjuſt Force is kept from the Bodies of Ambaſſadors; for if the Laws of Nations be broken by him, he is ſubject to Puniſhment: Yet the Opinions of Nations, and Men eminent for Wiſdom, have been doubtful in this Point, and Precedents on both Sides have been avouched: One which ſeems to refute that Poſition of puniſhing ſuch Miniſters of State: The Ambaſſadors of *Tarquin*, who had committed Treaſon at *Rome*, and as * *Livy* obſerves, were in the State of Enemies; yet the *Right of Nations* (as he calls it) *prevailed ſo far as to preſerve them, though in a Caſe of Hoſtility.* On the other Hand, † *Saluſt* obſerves, that *Bomilcar*, one of the *Carthaginian* Ambaſſadors, who came to *Rome* on the publick Faith, *was adjudged Guilty, rather* (ſaith he) *by the Rules of Equity, than by the Laws of Nations:* Equity, that is the mere *Law of Nature*, ſuffers Puniſhment to be exacted where there is found a Delinquent, but the *Laws of Nations* except the Perſons of *Ambaſſadors:* for certainly their Security out-weighs *the Profit ariſing from Puniſhment*, which may be inflicted by him that hath ſent him (if he be willing) if unwilling, it may be exacted of him as an Approver of the Crime.

Menander Protector Juſtino. Imper. Avarorum Legatos contra jus Legationum in vinculis habuit, Cothmann. Reſp. 32. *n.* 29. *Coke Inſtit.* 4. 153. 2 *H.* 5. *cap.* 6. 1 *M. Seſſ.* 1. *c.* 1.

* *Quanquam viſi ſunt commiſiſſe ut hoſtium loco eſſent, jus tamen Gentium valuit.*

† *Fit reus magis ex equo bonoque quam ex jure Gent. Bomilcar comes ei qui Romam fide publica venerat.* An Enemy is bound to whom they are ſent; but their Privilege obliges not thoſe through whoſe Bounds they paſs without Leave; for if they go to, or come from their Enemies, or make any hoſtile Attempt, they may be ſlain. *Liv. lib.* 26.

IX. Again, as *Ambaſſadors* are not to render a *Reaſon of their Actions to any other*, but to *him* by whom they are ſent; ſo it is impoſſible, by reaſon of various *Intereſts* and other *Secrets* of State, which paſs through their Hands, but ſomewhat may be ſaid, which bears a Show or Face of Crime; (which perhaps may prove otherwiſe) yet the examining and tracing of the Truth, may be of a dangerous Conſequence; and therefore if the Offence be

Grotius, l. 2. *c.* 18. §. 4. 4, & 5. *Senatus faciem ſecum attulerat auctoritatem Reip. M. Tull.* 8.

ſuch as may be contemned, it is uſually to be diſſembled or connived at, or elſe the Ambaſſador be commanded to depart the *Realm*; and if the Crime be cruel, and publickly miſchievous, the Ambaſſador may be ſent home with *Letters of Requeſt* to his Maſter, to inflict Puniſhment according to the Offence: So likewiſe in the Precaution of a great Miſchief, eſpecially publick, (if there be no other Remedy) Ambaſſadors may be apprehended and executed; and if they oppoſe by Force of Arms, they may be ſlain.

Coke Inſtit. 4. *fol.* 152.

Sic Carolus quintus Legato Ducis Mediolanenſis ut ſubditi ſui imperavit, ne à Comitatu ſuo abcederet, Guicciard. in dict. jam loc. Vide Cambden's *Eliz. Anno* 1571. 1584.

Co. 4 *Inſt. fol.* 152.

In the Biſhop of *Roſs*'s Caſe, *An.* 13 *Eliz.* the Queſtion was, *An Legatus qui rebellionem contra Principem ad quem legatus concitat, Legati privilegiis gaudeat, & non ut hoſtis pœnis ſubjaceat*; and it was reſolved, That he had loſt the Privilege of an Ambaſſador, and was ſubject to Puniſhment; nor can Ambaſſadors be defended by the Law of Nations, when they commit any thing againſt the State or Perſon of the Prince with whom they reſide.

Caſe of the Ambaſſador of *Muſcovy*. *Lucas*'s *Reports*, 4. 5.

X. And why Ambaſſadors are in Safety in their Enemy's Countries, and are to be ſpared when they commit Offences, is not ſo much for their own or *Maſter*'s ſake, *but becauſe without them there will never be an End of Hoſtility, nor Peace after War*: Neither is the *Name* or *Perſon* of an *Ambaſſador* ſo inviolable, either in Peace or in time of War, but there may be both a convenient time and a good Occaſion to puniſh them, and this ſtanding with the Laws of Nations, as may appear by theſe following Examples.

Thucyd. lib. 2. *Appian de Bello Illirico Siculi Athenienſium Socii Legatos Syracuſanorum miſſos ad Civitates alias cepere.*

1. The Law does not pertain to them through whoſe Bounds Ambaſſadors paſs without Leave; for if they go to their Enemies, or come from their Enemies, or make any hoſtile Attempt, they may be ſlain: So the *Athenians* did to the Ambaſſadors between the *Perſians* and *Spartans*; the *Illyrians* to the Ambaſſadors between the *Eſſeans* and *Romans*.

2. The Emperor *Charles* the Fifth, advertiſed of the League made againſt him, would not diſmiſs the Ambaſſadors

baſſadors of *France*, *England*, and *Venice*, till his own were in Safety, but he ſets Guards upon thoſe of *France*, *Venice*, and *Florence*, cauſing them to be conducted thirty Miles from his Court, with a Prohibition not to ſpeak to them, nor for them to write. As to him of *Milan*, as his Subject, he was enjoined not to part from Court; but as for him of *England*, there was no Alteration.

De Gallorum ad Turcam legatis, quos in Pado Hiſpani cepere occiderunt, vide Judicia Perutæ, lib. 11.

Camden Eliz. Anno 1571.

3. The *Venetians* having deſtroyed ſome of the *Corſairs*, *Amurath* commanded *Luigi Contarini*, then *Bailio* of *Venice* to be impriſoned.

Hiſtory of the Republick of *Venice, fol.* 450, 451.

4. The *Seigniory of Venice* underſtanding that certain Traitors, who had revealed their *Secrets* to the *Turk*, were fled for Protection into the Houſe of the *French* Ambaſſador at *Venice*, ſent Officers to ſearch the Ambaſſador's Houſe; but the Ambaſſador's refuſing them Entrance, the *Senate* commanded certain Cannon to be brought out of the *Arſenal* to beat down his Houſe, which when he ſaw planted, he ſurrendred up the Traitors.

5. The Ambaſſadors of *Tarquin*, *Morte affligendos Romani non judicarunt, & quanquam viſi ſunt ut hoſtium loco eſſent, jus Gentium tamen valuit.*

6. The *State of Rome*, though in Caſe of moſt Capital Crimes, exempted the *Tribunes* of the People from Queſtion during the Year of Office.

Goodwin de Leg. Antiq. Rom.

7. The Ambaſſadors of the *Proteſtants* at the *Council of Trent*, divulging there the *Doctrine* of the Church, contrary to a *Decree* there, whereby it was enacted a Crime equivalent to Treaſon, yet ſtood they protected from any Puniſhment.

Acta Tridentini Concilii.

It is generally conſented by all the *Civilians*, That *Legatis de jure Gentium indictum eſt, & eorum corpora ſalva ſint, propter neceſſitatem Legationis, ac ne confundantur Jura commercii inter Principes.*

Pompon. Leg. ult. D. de Legatis.

8. *Viva*, the *Pope*'s *Legate*, was reſtrained by *Henry* the Second for exerciſing a Power within his Realm, not allowed or admitted of by the King, in diſquiet of the State, and forced to ſwear not to act any thing *in præjudicium Regis vel Regni.*

Benedict. in Vita Hen. 2.

On the other hand, it hath been anſwered, That they are by the Laws of Nations exempted from Regal Trial; all Actions of one ſo qualified, being made the Acts of his Maſter, or of thoſe whom he repreſents, until he or they

they diſavow; and Injuries of one *Abſolute Prince* or *State* to another, is *factum hoſtilitatis*, and not *Treaſon*; the Immunity of whom *Civilians* collect, as they do the reſt of their Grounds from the Practice of the *Roman State*, deducing their Arguments from theſe Examples.

Colloquium Machiav. l. 2. *c.* 28. *Liv.* 2. *Doc.*

9. The *Fabii* Ambaſſadors from *Rome*, were returned ſafe from the *Chades*, with demand of Juſtice againſt them only, although they had been taken bearing Arms with the *Etrurians*, their Enemies.

Sir *Robert Cotton's Poſthumr.*

10. King *Edward* the Second of *England*, ſent amongſt others a *French* Gentleman Ambaſſador into *France*; the King upon this arraigned him as a Traitor, for ſerving the King of *England* as Ambaſſador, who was his Enemy (but the Queen procured his Pardon).

Rott. Scaccar. Weſtm. Clauſe Edw. primi.

11. *Henry* the Third did the like to one of the *Pope's* Ambaſſadors, his *Collegue* flying the Realm ſecretly, fearing, *timens pelli ſui*, as the Records have it. *Edward* the Firſt reſtrained another of the *Pope's* turbulent Ambaſſadors, till he had (as his Progenitors had) informed the *Pope* of the Fault of his *Miniſter*, and received Satisfaction for the Wrongs.

12. *Henry* the Eighth commanded a *French* Ambaſſador to depart preſently out of the Realm, becauſe he was the profeſſed Enemy of the See of *Rome*.

Herbert's Hiſt. *H.* 8. *Anno* 1523.

13. *Lewis de Prat*, Ambaſſador for *Charles* the Fifth, was commanded to his Houſe, for accuſing falſly Cardinal *Woolſey* to have practiſed a Breach between *Henry* the Eighth and his Maſter, to make up the Amity with the *French King*.

14. Sir *Michael Throgmorton*, by *Charles* the Ninth of *France*, was ſo ſerved, for being too buſy with the Prince of *Conde's* Faction.

15. The *Pope's* Ambaſſador at *Paris* was arraigned, for practiſing certain Treaſons in *France* againſt the King, in the Parliament of *Paris*, and was found there guilty and committed to Priſon.

Cambden's Hiſt. Q. *Eliz.* *A.* 1567.

16. Doctor *Man* then Ambaſſador was taken from his Houſe at *Madrid* in *Spain*, and put under a Guard to a ſtraiter Lodging for breeding a Scandal (as the *Conde Teri* ſaid) in uſing by Warrant of his Place, the Religion of his Country, although he alledged the like permitted to

Guzman

Guzman de Silva, their Ambaſſador in *England*, and to the *Turk* no leſs than in *Spain*.

17. *Francis* the Firſt, King of *France*, ſent *Cæſar Fregoſus* and *Anthony Rincome*, Ambaſſadors to the *Turk*; they were ſurprized by the Armies of *Charles* the Fifth on the River *Po* in *Italy*, and were put to Death; the *French* King complained that they were wrongfully murdered; but the *Emperor* juſtified their Death; for that the one was a *Genois*, and the other a *Milanois*, and his Subjects feared not to ſerve the King his Enemy. *Guicciard. lib.* 18.

18. *Henry* the Eighth being in a League with the *French*, and at Enmity with the *Pope*, who was in League with the *French* King, and who had ſent Cardinal *Pool* to the *French* King, of whom King *Henry* demanded the *Cardinal*, being his Subject, and attainted of Treaſon, *ſed non prævaluit*. *Herbert's* Hiſt. *H.* 8.

19. *Samuel Pelagii*, a Subject to the King of *Morocco*, pretended that he was an Ambaſſador ſent unto the *States General* of the *United Provinces*; he came to them, and accordingly they treated with him, afterwards he departed; and being upon the Sea, he there took and ſpoiled a *Spaniſh* Ship; and then came into *England*; the *Spaniſh* Ambaſſador here having received Intelligence of the ſpoliation, cauſed his Perſon to be ſeized upon, intending to proceed againſt him as a Pirate, and impriſoned him; and upon Conference with the Lord *Coke*, *Doderidge*, and other Judges and *Civilians*; they declared their Opinions, That the Caption of the *Spaniard*'s Goods by the *Morocco* Ambaſſador, is not in Judgment of Law a *Piracy*, in regard it was apparent that the King of *Spain* and the King of *Morocco* are Enemies, and the ſame was done in *open Hoſtility*; and therefore in Judgment of Law could not be called *Spoliatio*, *ſed legalis Captio*; and a Caſe out of 2 *R.* 3. *fol.* 2. was vouched, where a *Spaniſh* Merchant before the King and his *Council*, *in Camerâ Scaccarii*, brought a Bill againſt divers *Engliſhmen*, therein ſetting forth *quod deprædatus & ſpoliatus fuit* upon the Sea, *juxta partes Brittaniæ*, *per quendam Virum bellicoſum de Britannia de quadam Navi*, and ſo of divers Merchandizes therein, which were brought into *England*, and came into the Hands of divers Engliſhmen, naming them, and ſo had

Proceſs

Proceſs againſt them, who came in, and pleaded, That in regard this Depredation was done by a Stranger, and not by the Subjects of the King, therefore they ought not to be puniſhed; in regard that the *Statute* of 31 *H.* 6. *Cap.* 4. gives Reſtitution by the *Chancellor*, *in Cancellaria ſibi vocato uno Judice*, *de uno Banco vel altero*; and by the *Statute* of 27 *Ed.* 3. *cap.* 13. that the Reſtitution may be made in ſuch a Caſe upon Proof made, by the *Chancellor* himſelf without any Judge; and upon that Caſe it was re-
3 *Bulſtrode* 28. ſolved, *Quod quiſquis extraneus*, *&c.* who brings his Bill
1 *Ro.Rep.* 175. upon this *Statute* to have Reſtitution, *debet probare quòd tempore captionis fuit de amicitia Domini Regis*; and alſo, *quod ipſe qui eum ceperit & ſpoliavit*, *fuit etiam ſub obedientia Regis*, *vel de amicitia Domini Regis*, *ſive Principis querentis tempore ſpoliationis*, *& non inimicus Domini Regis ſive Principis querentis*, *qui ſi fuerit inimicus*, *& ſic ceperit bona*, *tunc non fuit ſpoliatio*, *nec deprædatio*, *ſed legalis captio*, *prout quilibet inimicus capit ſuper unum & alterum*: the Judgment of which Caſe was held to be Law, and thereupon the Judges delivered their Opinions, that the *Morocco* Ambaſſador could not be proceeded againſt as a Pirate.

20. In the time of *Philip* the Second of *Spain*, the *Venetian* Ambaſſador in *Madrid* protecting one *Bodovario*, a *Venetian*, an offender, that fled into his Houſe, and denying the *Corrigidor* or *Juſtice*, to enter his Houſe, where the Ambaſſador ſtood arm'd to withſtand them; upon Complaint made, the Ambaſſador was removed unto another Houſe, till they had ſearched, and found the Offender; then conducting back the Ambaſſador with all due reſpect, a Guard was ſet upon his Houſe to ſtay the fury of the enraged People; the Ambaſſador complaining to the King, he remitted it to the *Supreme Council*: they juſtified the Proceedings, condemning *Bodovario* to loſe his Head, and other the Ambaſſador's Servants to the *Gallies*, all which the King turned to Baniſhment; and to ſatisfy the moſt *Serene Republick*, ſent the whole Proceſs to *Inego de Mendoza*, his Ambaſſador at *Venice*, declaring by a publick Ordinance unto that State, and all other Princes, *That in caſe his Ambaſſadors ſhould commit any Offence unworthily, and diſagreeing to their Qualities and Profeſſions of Ambaſſadors, they ſhould not enjoy the Privilege of thoſe Officers, but he would refer them to be judged by the Laws of that Prince*

or

or State where they then reſided, and where they had injured. It was a great and noble Saying.

Sir *Hen. Wootton:* State of Chriſtendom, *fol.* 211.

21. In the Year 1568, *Don Gubernon d'Eſpes* was order'd to keep his Houſe in *London*, for ſending ſcandalous Letters to the Duke *d'Alva* unſeal'd; and in 1586, *Don Bernardino de Mendoza*, was reſtrained firſt, and after commanded away.

Vide Sir *Robert Cotton*'s *poſthum.* and the Propoſition to King *James*.

XI. The manner of proceeding againſt them, according to the practice in *England*, hath been conceived neceſſary to be, that ſome of the Chief Secretaries of State were ſent to the Ambaſſadors, and by way of advice, that underſtanding that the common People having receiv'd notice of, *&c.* "And that they cannot but conceive a "juſt fear of uncivil carriage towards their *Excellencies* "or their Followers, if any the leaſt Incitement ſhould "ariſe, and therefore for Quiet of the State, and ſecu-"ring of their Perſons, they were bound in Love and "Reſpect to their *Excellencies* to reſtrain as well them-"ſelves as Followers, till a further Courſe be taken by "legal Examination, where the Aſperſion began, the "ſame being in their opinions the beſt and the only way "to prevent the danger, *&c.*"

Sometimes, if the *Parliament* be ſitting, the King acquaints the *Lords*, and then departs; who having had Conference with the *Commons*, conclude of a *Meſſage* to be ſent to the Ambaſſadors, (either by requiring an account of the matter or confining of them) the Perſons to be ſent, the two *Speakers* of both *Houſes*, with ſome convenient number of either, having their Maces, or Enſigns of Offices born before them to the Ambaſſador's Gates, and then forborn; and then requeſting Speech with them, let them know that a Relation being made that Day, in open *Parliament* of, *&c.* they were deputed from both *Houſes*, *the great Council of the Kingdom*, to the which by the Fundamental Laws of this Nation, the chief Care of the King's Safety, and the publick Peace and Quiet of the Realm is committed; and that they were no leſs the *High Court of Juſtice*, or *Superſedeas* to all others, for the examining and puniſhing all Attempts of ſo high a nature, *&c.* if it carry truth; and having executed their Commiſſion, conclude that the Houſes, to ſhew that reverence which they bear unto the Dignity of his *Maſter* by

by their *Meſſage*, declare that they two who are never employed but to the King alone, were at that time ſent, &c. and if the Houſes ſhall upon return of their *Speakers* conceive their Anſwers (if it be a Matter that requires it) are ſuch as may juſtly deſerve their being confined, they then make an addreſs to his *Majeſty* to confine them to their Houſes, reſtraining their departure till the Prince or State, whom they repreſent, be acquainted with their offence: And ſo it was done in 44 *H.* 3. to the *Pope*'s *Legates* in *England*, and 28 *E.* 1.

The *Parliament* not ſitting, the Secretaries of State may ſignify the like, if occaſion, &c.

XII. If a Foreign Ambaſſador, being a *Prorex*, commits here any Crime which is *contra Jus Gentium*, as Treaſon, Felony, Adultery, or any other Crime which is againſt the Law of Nations, he loſeth the privilege and dignity of an Ambaſſador, as unworthy of ſo high a place, and may be puniſhed here as any other private Alien, and not to be remanded to his Sovereign but of courteſy.

The opinion of the Lord *Coke*, 4 *Inſtit.* *fol.* 153, &c.

XIII. But if any thing be *malum prohibitum* by any Act of *Parliament*, private Law, or Cuſtom of this Realm, which is not *malum in ſe Jure Gentium*, nor *contra Jus Gentium*, an Ambaſſador reſiding here, ſhall not be bound by any of them; but otherwiſe it is of the Subjects of either Kingdom; for if a *French* Merchant or *Spaniſh* Merchant trades or imports any prohibited Goods, he muſt at his peril obſerve the Laws of *England*; and ſo it was adjudged *Paſc.* 33 *Eliz.* in the *Exchequer*, *Tomlinſon*, *qui tam verſus Henry de Vale & al.* upon the *Statute* of 19 *H.* 7. *Cap.* 21. but if an Ambaſſador imports any prohibited Goods, *è contra*.

The *Florentines* having ſent Ambaſſadors to *Charles* the Fifth and *Clement* the Seventh, being then at *Bolonia*, together with their Houſhold-ſtuff, they brought covertly many rich Commodities to ſell and traffick with, ſuppoſing that they might be free from paying the Gabel; but the Seachers of the Cuſtom-houſe having diſcovered it, they became objects of laughter and mirth to the *Bolonians*, and for that, as unworthy of the Office of Ambaſſadors, were remanded home without Audience.

Jovius, *fol.* 125.

Sir *Thomas Challoner* having been ſent Ambaſſador to *Spain* by Queen *Elizabeth*, remitted a Complaint to the Queen, that his Cheſts had been ſearched: upon which the Queen demanded the opinion of her Council in the

point

point, who upon the whole matter reſolved the Action into this, *Legato omnia æqui bonique ferenda dummodo Principis Honor non directè violetur*, the very words of Mr *Camden*, An Ambaſſador muſt bear all things patiently, provided that the Honour of the Prince (whom he ſerves) be not directly violated.

XIV. The Office of an Ambaſſador does not include a protection private but publick, for the King his Maſter, not for any ſeveral Subjects otherwiſe than as it concerns the King and his publick Miniſters, to protect them, and procure their protection in foreign Kingdoms, in the nature of an *Office* and *Negotiation of State*; therefore their Quality is to mediate and proſecute for them or any one of them, at the *Council-Table*, which is as it were a *Court of State*; but when they come to ſettled Courts, which do and muſt obſerve eſſential forms of proceeding, *ſcil. proceſſus legitimos*, they muſt be governed by them: And therefore in the Caſe of *Don Diego Serviento de Acuna*, *Ambaſſador Lieger* for the King of *Spain*, who libelled in the *Admiral Court* as *Procurator-General* for all his Maſter's Subjects, againſt one *Jolliff* and *Tucker*, and Sir *Richard Bingley*, for two Ships and their Lading of divers kinds, of the Goods of the Subjects of the King of *Spain* generally, and not naming of them *adduct ad Port de Munſter*, in the Preface of the Libel generally againſt them all, and then proceeds and charges them ſeverally thus; That *Jolliff* and *Tucker* Captain *Piratæ*, *in alto Mari bellicè dictas Naves aggreſſi ſunt*, *& per vim & violentiam* took them, and that they were *adductæ in partes Hiberniæ*, and that coming into the hands of Sir *Richard Bingley*, he converted them to his own uſe, (not ſaying where) and refuſing to render them being required, it was there held that a *Prohibition* ſhould go, for the matter is Triable merely at the *Common Law*, and that ſuch a Procuration was not good, though to an Ambaſſador.

Leg. ſi F. de lega. in aut. de ſanctiſſ. §. rerum, coll. 9.

Lord *Hobart*, *fol.* 78. *Sed Vide Cro. El.* 685. *Yelv.* 135, 173. *Hard.* 183. 1 *Sid.* 320, 367. 2 *Saund.* 260. 2 *Lev.* 25. 1 *Ven.* 173, 208.

Don Alfonſo de Valeſco Ambaſſador from the *Catholick* King, attached Tobacoes at Land here, which one *Corvero* a Subject of the King of *Spain*, brought hither, and the Ambaſſador by his Libel ſuppoſed to belong to his Maſter, as Goods confiſcated, as all other his Goods were. Sir *John Watts* the Plaintiff in the ſuggeſtion, prayed a *Prohibition*, which was granted accordingly, for the property

perty of Goods here at Land muſt be try'd by the *Common Law*, however the Property be guided; and it was likewiſe rul'd, that if any Subject of a Foreign Prince bring Goods into this Kingdom, though they were confiſcate before, the Property ſhall not be queſtioned but at the *Common Law*, *Don Alfonſo verſ. Corvero*, *Mich.* 9. *Jac. Hob.* 212. *Hill.* 9. *Jac.* upon the like Libel by *Don Pedro Surega* Ambaſſador for *Spain*.

XV. Whether an Ambaſſador hath Juriſdiction over his own Family, and whether his houſe be a *Sanctuary* * for all that fly into it, depends upon the conceſſion of him with whom he reſides, for this belongs not to the Law of Nations †; and it hath been ſeen that an Ambaſſador hath inflicted puniſhment on his own Servants and Vaſſals, as the *Muſcovite* did here in *England*; but that muſt be purely by conceſſion, as the *Turk* permits it to the *Engliſh* Ambaſſador at *Conſtantinople*: But Fugitives that fly into their Houſes, nay, their own Servants if they have greatly offended, cannot be drawn out by force, without a Demand and Refuſal; which when done, it is then become as an offence in them.

* *Diſtingui ferme hac in re ſolent crimina. Vide Parutam, lib.* 10. *ubi Rex Galliæ hanc ob cauſam iratus pacatur: Vide eundem, lib.* 11.

† *Grot. de Jure Belli ac Pacis, lib.* 18. §. 4, 5, 6, 7.

XVI. Moſt certain by the *Civil Law*, the moveable Goods of an Ambaſſador, which are accounted an acceſſion to his Perſon, cannot be ſeized on, neither as a pledge, nor for a payment of a Debt, nor by *Order* or *Execution of Judgment*; no nor by the King or *States* leave where he reſides (as ſome conceive) for all coaction ought to be far from an Ambaſſador, as well that which toucheth his neceſſaries as his Perſon, that he may have full ſecurity; if therefore he hath contracted any Debt, he is to be called upon kindly, and if he refuſes, then Letters of *Requeſt* are to go to his Maſter *; ſo that at laſt that courſe may be taken with him as with Debtors in another Territory; to ſome this may ſeem hard, yet Kings, who cannot be compelled, want not Creditors; but the Lord *Coke* ſeems to be of another opinion †, for as to Contracts and Debts that be good *Jure Gentium*, he muſt anſwer here.

Rex faciſne me tu regium nuntium populi Romani Quiritum vaſa comiteſq; meos: yet an Ejectment hath been brought and left at the Houſe of the Ambaſſador, and it was allowed good, and conceived no breach of their privilege in the Caſe of *Monſ. Colbert* for *York* Houſe, *Mich.* 28 *Car.* 2. *in Banc. Reg.*

* *Grotius, lib.* 2. *cap.* 18.

† *Coke* 4. *Inſtit. fol.* 153. Certain it is that none dareth preſume to meddle either with their Perſons, Goods, or Servants, without leave had, the contempt of which hath been puniſhed with Impriſonment. *Lucas* 4. *Vid. Stat.* 7. *A. ch.* 12. §. 5.

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nice whatſoever he expends is allowed him upon his accounts without any examination: the which no other of their publick Miniſters of State have like privilege.

By the Laws of *Venice* there can be no extraordinary Ambaſſador employed, unleſs they have been Ambaſſadors formerly, and upon their return are ſtrictly examined of their Comportment in their Legation, and are to diſcover what Preſents they have received from the Prince or State to whom they were ſent, the concealment of which is of a very dangerous conſequence.

Bodinus de Repub. lib. 3.

Nor may any of their Ambaſſadors receive any Preferment from any other State during their Legation. The *Patriarch of Aquileia* dying, *Hermolao Barbaro* being there Ambaſſador for that *Republick*, the *Pope* conferred on him that *Eccleſiaſtical Dignity*, and made him a *Cardinal*; which being known at *Venice*, notwithſtanding he was a Perſon of great Merit, and had given notice to the *Senate*, rich, well allied, and had good Friends, they ſent expreſs command that he ſhould reſign the *Patriarchſhip*, otherwiſe they would take from his *Father* the *Procurator ſhip* of St *Mark*, and confiſcate all his Eſtate.

Jac. Aug. Thuanus, l. 27. *in Vita Auguſtini Barbadico* Duke of *Venice, Anno* 1486.

But if ſuch Ambaſſadors have received any Preſent, Gift, or Reward, from any Foreign Prince or Republick, and ſuch Miniſters of State are thought worthy of retaining the ſame, ſuch a Grace muſt paſs by the Suffrage of the Senate, to oblige them more to the benevolence of the Republick, than to the bounty of any Foreign Prince. The conſideration of which put the ſame generous ſcruple into the Breaſt of Sir *Amias Paulet*, who returning from his Ambaſſy in *France*, would not at his departure receive from the *French* King the Chain of Gold which is given of courſe, till he was half a League out of *Paris*. But more famous was the action of Sir *Leoline Jenkins*, the *Engliſh* Ambaſſador at *Nimeguen*, who, though after the Treaty concluded, abſolutely refuſed the *French* King's Preſent.

Paulus Paruta in Hiſt. Ven. lib. 7.

Francis Hotteman, fol. 23, 24.

XX. By the Laws of Nations, in the Reception of Ambaſſadors, thoſe from a King are generally introduced by an Earl or Count, thoſe from a Duke or Republick by a Baron; nor are they to be allowed that Honour but only at their firſt and laſt Audience.

XXI. Pro-

XXI. Prophane Hiſtories are full of Wars becauſe of wrong done to Ambaſſadors; and in the ſacred Story is extant the memory of the War which *David* upon that Ground waged againſt the *Ammonites*: nor doth *Cicero* eſteem any Cauſe more juſt againſt *Mithridates*; and at this day not only *Lawyers* *, but *Divines* † are all of the ſame opinion, That a War cannot be more juſtly commenced than for the Violation done to their Publick Miniſters.

* *Grot. l.* 2. *c.* 18. §. 11.
† *Montague's* Acts and Monuments, *fol.* 450.

CHAP. XI.

Of the Right of delivering Perſons fled for Protection.

I. *Where Superiors may become culpable for the Crimes of their Subjects.*
II. *Offences by whom properly puniſhed, whether by the injured State or they into whoſe Territory the offender is fled.*
III. *Whether Kingdoms and States ought to deliver up Fugitives, if required, or not.*
IV. *Where Perſons are fled, the places whither they come, ought to be Aſylums.*
V. *How diſtinguiſhed, and when to be puniſhed or delivered.*
VI. *Whether an innocent Man may be deſerted and delivered up to the enraged Power that demands him.*
VII. *Whether an innocent Perſon may be deſerted and yielded, if War be threatned.*
VIII. *Whether an innocent Perſon refuſed to be delivered up, ought to yield himſelf.*
IX. *If Charity in an innocent to yield himſelf, whether Compulſion may be uſed if he refuſes.*
X. *Whether this of delivering up does extend to Sovereign Princes driven out of their Country.*
XI. *Perſons running away with the Publick Revenue, where their Perſons and Goods have been ſeized till reparation and ſatisfaction be made.*

I. FAthers are not bound for the fault of their Children, nor Maſters for thoſe of their Servants; nor Princes for the Actions of their Subjects, unleſs they become partakers in the Crime; the which may be done in two reſpects, by ſufferance and receipt; therefore if Princes ſhall ſuffer or countenance their Subjects, by Pictures or Libels, or otherwiſe, to abuſe another Nation or Common wealth, it is the ſame as if they ſhould authorize it. *Brutus* to *Cicero*, *How can you make me guilty? Yes, well enough, if it were in you to hinder it*; but receipt may admit of ſome further ſcrutiny.

Zeno interceding for the *Magnets* to *T. Quintus* and the Legates with him beſought them with tears: *ne unius amentiam civitati aſſignarent, ſuo quemque periculo facere, Liv. l.* 40.

II. *Commonwealths* being inſtituted, it was agreed that Faults of Particulars, which do properly belong to their own Society, ſhould be left to themſelves and their Soveraigns, to be puniſhed or connived at, as they judged moſt fit.

Yet that *Right* is not ſo abſolutely left to them, but Offences, which tend to the Deſtruction of Society or Government, whereof *Treaſon* is the chiefeſt, may ſeem to be excepted; for if a Subject ſhall commit an Act tending to the Subverſion of his Soveraign's Government, the ſame is an Offence that's ſubject to an *univerſal puniſhment*, i. e. it is to be puniſhed every where; and the Governors into whoſe Territory ſuch fly, ſeem to have a Right of proſecuting for the Offence: In Civil Actions, which tend to Commerce that ſupports Society, the Subjects of foreign Nations having juſtly contracted Debts in their own Country, may obtain Juſtice in another; by a ſtronger Reaſon it is thought, that Princes or Republicks that have received publick Injuries, have Right to require Puniſhment for the Indignity that is offered them, at leaſt for that which tended to the Subverſion of their Government, and to have the Offenders delivered up.

Roll's Abridgment, *fol.* 530. *Weyer*'s Caſe.

III. The Queſtion is Illuſtrious, Opinions grounded on ſeveral great Precedents have been both ways produced: It hath been generally held, That thoſe Kingdoms where the Offenders are fled, ought to do one of the two, *either puniſh them according to their Deſerts being called upon*, *or leave them to the Judgment of the offended State*; others on the contrary; moſt certain it is by the *delivering up*, is underſtood, to leave him to the legal Judgment of that Prince or State, whom he hath offended: And ſuch was the Declaration of *Ferdinand* King of *Spain*, who had been often requeſted by *Henry* the Seventh to deliver up *Edmond de la Pool* Earl of *Suffolk* his Subject, then fled for Protection to that Prince's Country, but was always refuſed; but being continually importuned by Promiſes that he ſhould not be put to Death, cauſed the Earl to be deliver'd up to him, who kept him in Priſon, and conſtruing his promiſe *to be perſonal to himſelf*, commanded his Son *Henry* after his Deceaſe to execute him, who in the fifth Year of his Reign in *cold Blood* performed the ſame. But the Malice of that politick Prince the Father, and the uncon-

For the knowledge of the Cauſe ought to precede the Redition; *non decet homines dedere cauſa non cognita* *Plutarch* in his *Romulus*.

Attainted by Act of Parliament 12 *H.* 7. *Co. Inſt. fol.* 180.

Herbert's Hiſt. *H.* 8.

Pepin received, and would not deliver up

troulable

troulable Will of the Son are Precedents but of ſmall Force; the Example of which, not long after, gave the *French King* occaſion to beware of truſting the latter with a Subject of his on the like occaſion; for *Cardinal Pool* not many Years after, coming Ambaſſador from the *Pope* to the *French* King, they both being then in Amity, and *Henry* the Eighth in League with the latter, but in Enmity with the firſt, requeſted to have the *Cardinal* delivered up, but could not prevail, being doubly armed, as the Ambaſſador of a Sovereign Prince, (for ſuch is the *Pope*) and in the Territory of a foreign State.

those that fled to him out of *Neuſtria*, oppreſt by Tyranny. *Fredegar in reb. Pep. An.* 1188.

The *Iſraelites* required of the *Benjamites* to deliver up the wicked Men; the *Philiſtines*, *Sampſon*. *Cato* gave his Vote that *Cæſar* ſhould be delivered to the *Germans*, for ſpoiling them without juſt Cauſe. Nor are nocent Perſons injured, if they are either delivered up, or puniſhed; yet does it not thence follow that they muſt be delivered up or puniſhed: The *Romans* delivered up thoſe that had done Violence to the *Carthaginian* Ambaſſadors; yet the Ambaſſadors of the *Abaſſines* having been traiterouſly murthered by one of the Templars at *Jeruſalem*, the Offender being demanded, that ſo Juſtice might be executed on him for the Act, the *Grand Maſter* anſwered, That he had already enjoined him Penance, and had directed him to be ſent to the *Pope*, but abſolutely refuſed to deliver him up.

Tyrius, lib. 20. *cap.* 23. *Anno* 1173.

IV. But then, and as in this laſt, ſo in all other, the Offender muſt have committed ſome publick Offence *, as Treaſon; for moſt certainly it extends not to private Injuries, becauſe there is no Precedent that ever a War was begun for ſuch, though they may contribute much, but for thoſe which tend to the Subverſion or Ruin of a Country, they often have been delivered up; *Jugurtha* of *Bocchus* in *Salluſt*, *So ſhall thou at once free us from the ſad neceſſity of proſecuting thee for thy Error, and him for his Treaſon.* And by moſt Writers it is agreed, that ſuch Offenders muſt either be delivered up or puniſhed, the Election is left to their Choice, into whoſe Territory they are fled; though ſome have held, that in caſe of Protection or Sanctuary for ſuch unfortunate

* Yet out of Churches beyond Seas for private Offences, which are univerſal Sanctuaries, the Offenders have been taken: In *Lucitania*, *Ferdinand* Lord Chamberlain was taken by Force out of the Church and burnt, for

forcing a Noble Virgin. *Mariana, lib.* 11. fortunate Perſons, Princes do make their Countries *Aſylums* †.

Charles Duke of *Burgundy* delivered up to *Lewis* the Eleventh, the Earl of St *Paul*, Conſtable of *France*, who flying to ſome of his own Cities, obtained Letters of Safe-Conduct to come and commune with the Duke, in order to the making his Peace with the King; but the Duke after he had him in Cuſtody, delivered him to the King of *France*, who immediately after cut off his Head. *Phil. Comines, l.* 4. *c.* 12.

† *Ludovicus Pius* the Emperor received thoſe that fled to him from the *Roman Church*, as appears by his Decree, *Anno* 817. and *Luther* himſelf did not want Princes to protect him from the Fury of St *Peter*'s Chair. *Vide* his *Colloquiums*.

T. Quintus Flaminius ſent Ambaſſador to *Pruſias* King of *Bithynia*, for the procuring the delivering up the brave but unfortunate *Hannibal*, who accordingly being ſeized on, *I will now*, ſays he, *deliver the Romans of that Fear which hath ſo many Years poſſeſt them; that Fear which makes them impatient to attend the Death of an Old Man: This Victory of* Flaminius *over me, who am diſarm'd and betray'd into his Hands, ſhall never be numbered amongſt the reſt of his Heroical Deeds: No, it ſhall make it manifeſt to all the Nations of the World, how far the antient Roman Virtue is degenerate and corrupted; for ſuch was the Nobleneſs of their Foreſathers, as when* Pyrrhus *invaded them in* Italy, *and was ready to give them Battle at their own Doors, they gave him Knowledge of the Treaſon intended againſt him by Poiſon; whereas theſe of a latter Race have employed* Flaminius, *a Man who hath hereſore been one of their Conſuls, to practiſe with* Pruſias, *contrary to the Honour of a King, contrary to his Faith given, and contrary to the* Laws of Hoſpitality, *to ſlaughter or deliver up his own Gueſt. Then took a Draught of poyſon, and dy'd.*

Sir *Walter Ralegh*'s Hiſt. *Vol.* 11. *p.* 781. *Edit.* 1736.

V. Though Kingdoms and States are looked upon as places of Refuge; yet that muſt be underſtood for thoſe that are perſecuted with cauſeleſs Hatred, not to ſuch as have committed that which is injurious to human Society, or to other Men. *Gilippus* the *Laconian* in *Diodorus Siculus*, ſpeaking of the Right of ſuch miſerable Fugitives, ſaith, *They that introduced theſe Rights at firſt, meant the Unfortunate ſhould expect Mercy, the Injurious Puniſhment*—— After—*Theſe Men, if by the unjuſt Deſire of that which is another's, they have fallen into theſe Evils, muſt not accuſe Fortune, nor impoſe on themſelves the Name of Supplicants,*

Lib. 13.

for

for that by Right belongs to them that have an innocent Mind, and adverſe Fortune.

Carum occidiſti, dum vis ſuccurrere: nullum
Crimen habes; manus eſt ibi purior, ac fuit ante.

But the Life of thoſe Men full of wicked Acts, ſhut up againſt them all Places of Refuge, and leaves no room for Compaſſion. *Cicero* hath a Saying out of *Demoſthenes*: *We muſt ſhew Compaſſion to thoſe whom Fortune, not their own evil Deeds, hath made Miſerable.* And by the holy Law, when any one had been ſlain by an Ax ſlipping out of another's Hand, the Cities of Refuge were open: The moſt holy Altar it ſelf was no Protection for thoſe that had ſlain an innocent Man maliciouſly, or had troubled the Commonwealth; which Law *Philo* explaining, ſaith, *Unholy Men have no Entertainment in the Holy Place.* *Lycurgus* the Orator relates that one *Calliſtratus*, having committed a Capital Fault, and adviſing with the Oracle, received anſwer, *That if he went to* Athens *he ſhould have Right*: And thereupon, in Hopes of Impunity, he fled to the moſt holy Altar there, notwithſtanding which he was taken from thence, and put to Death by the City moſt obſervant of her Religion, and ſo the Oracle was fulfilled. *Princes indeed* (ſaith *Tacitus*) *are like Gods, but neither do the Gods hear the Prayers of Supplicants, unleſs they be juſt.* Such then are either to be puniſhed or delivered up at leaſt; yet ſurely this hath been obſerved to extend only to thoſe Crimes that touch the State, or at leaſt are of a very heinous Nature; ſometimes they are expreſsly ſtipulated by Leagues to be delivered up; however this is to be obſerved, that ſuch ſort of Fugitives and Supplicants, be they Foreigners or Subjects, are to be protected till they have been fairly tryed; and if that whereof they are accuſed, be not forbidden by the Law of Nature or Nations, the Cauſe muſt be tryed and adjudged by the Municipal Laws of that Kingdom or State from whence the Crime doth ariſe. From which it may be obſerved, that a Fault committed in *England*, and the Perſon flying, and Requeſt made; yet, by Reaſon that none can by the Laws of that Nation be tryed but *per Pares*, nor then but in Perſon; it will thence follow, that

They of *Holland* lately delivered up the famous poiſoning Cook that had been in the wicked Conſpiracy with the Counteſs of *Soiſſons* in *France*.

that ſuch may ſeem out of the general Rule: However, it may ſtand with the higheſt Reaſon, that the Fact and Proof being remitted over with the Requeſt, there may appear a juſt Ground for the Demand.

VI. Whatever the Opinion of thoſe Writers have been the Practice of latter Ages hath ſeemed to incline otherwiſe. Queen *Elizabeth* demanded *Morgan* and others of her Subjects fled into *France*, that had committed Treaſon againſt her; the Anſwer of the *French* King was, *Si quid in Gallia machinarentur, Regem ex jure in illos animadverſurum; ſin in Anglia quid machinati fuerint, Regem non poſſe de eiſdem cognoſcere, & ex jure agere; omnia Regna profugis eſſe libera; Regum intereſſe, ut ſui quiſque Regni libertates tueatur, imo Elizabetham non ita pridem, in ſuum Regnum Mountgumerium, Principem Condæum, & alios è Gente Gallica admiſiſſe, &c.* and they were never delivered up: but the like was not returned by the King of *Scotland*, for he promiſed that he would tranſmit *Ferniburſt* and the *Chancellor* too, if they were convicted by a fair Tryal.

34 *Eliz. Camden, fol.* 35. *Vide Camb. Anno* 1585.

Liv. lib. 22. *cap.* 37.

Perſeus King of *Macedon*, in his Defence to *Martius*, ſpeaking of thoſe that were ſaid to have conſpired againſt *Eumenes*: *So ſoon as I was admoniſhed by you, and finding the Men in* Macedonia, *I commanded them away, and charged them never to return into my Dominions.* The Cry of the Royal Martyr's Blood, juſtly procured them of *Holland* to deliver up the *Regicides* to the injured Succeſſor. And from the Crown of *Denmark* it was expreſsly ſtipulated they ſhould be delivered in theſe Words: *Item quod ſi qui eorum qui rei ſunt illius nefandi Parricidii in Regem* CAROLUM *Primum beatiſſimæ Memoriæ admiſſi, ac legitimè de eodem ſcelere attincti, condemnati, vel convicti, &c.* "If any of them who are guilty of the horrid Murder "committed upon King *CHARLES* the Firſt of "Bleſſed Memory, be either now in the Dominions of "the King of *Denmark* and *Norway*, or ſhall hereafter "come thither, that as ſoon as it ſhall be known or told "to the King of *Denmark*, or any of his Officers, they "be forthwith apprehended, put in ſafe Cuſtody, and "ſent back into *England*, or be delivered into the Hands "of thoſe whom the King of *Great-Britain* ſhall order "to take charge of them, and bring them home.

Anno 1660. In the Alliance between thoſe Crowns, *Feb.* 13. 1660. provided for in the fifth Article.

VII. Moſt

VII. Moſt certain it is, if War be threatned to a Nation or People, if they deliver not up the Offender, tho' perhaps he is innocent, and that ſuch is the Malice of his Enemies, that they know they will put him to death, yet he may be deſerted, eſpecially if that Nation or Kingdom is inferior to others; but then the ſame ought not to be done raſhly. The *Italian* Foot that forſook the unfortunate *Pompey* before all was loſt, being aſſured of Quarter from the victorious *Cæſar*, were condemned by moſt that reported the Story of that day.

That politick Princeſs Queen *Elizabeth*, gave the *Scots* a more equitable anſwer, when they demanded *Bothwell*, ſhe anſwered, that ſhe would either render him up, or ſend him out of *England*. *Cambden Anno* 1593.

Pope Alexander (in the mortal Feud between him and the *Emperor Frederick*, who favoured *Octavian* the *Antipope*) fled diſguiſed to *Venice*, the *Duke* and *Senate* being jealous that the *Emperor* would demand him, ſent an Embaſſy to the *Emperor* to endeavour a Mediation and Peace, which was no ſooner offered, but the *Emperor* broke out into a Rage, bidding them go home, ſaying; "Tell your "Prince and People, that *Frederick* the *Roman* Emperor "demands his Enemy, who is come to them for Succour, whom if they ſend not preſently bound hand "and foot, with a ſure Guard, he will proclaim them "Enemies to him and the whole *Empire*, and that there "is neither Alliance or Laws of Nation which ſhall "be able to free them from revenge for ſuch an Injury, to "proſecute which he is reſolved to overturn all divine "and human Laws, that he will ſuddenly bring his Forces "before their City, and contrary to their expectation, "plant his *Victorious Eagles* on the Market-place of St "*Mark*." This Meſſage being faithfully delivered, the *Senate* decreed *Arms*, *Arms*; and while they were preparing, News was bought that *Otho*, the Emperor's Son, and General of the *Cæſarean* Fleet, was entred the *Gulph* with ſeventy-five Gallies; the moſt valiant and religious *Sebaſtiano Cyani* reſolved to meet him, and having encountred them on the Coaſt of *Iſtria*, defeated *Otho*, and all his Naval Forces, taking forty-eight Gallies, *Otho* their *Admiral* and the reſt either burnt or deſtroyed; he returned in Triumph for *Venice*, and not long after *Frederick* became convinced, that *Heaven* fights the Battles of the Innocent, and

Hiſt. Reip. Ven. In Vita Sebaſtiani Cyani Duke of *Venice*, *Anno* 1164.

and on his knees begg'd pardon of *Alexander* the Fugitive *Pope.*

Lewis the Eleventh of *France* required by Ambaſſadors of *Philip* Duke of *Burgundy*, the delivering up of Sir *Oliver de la Marche*, (who being a *Burgundian*, had wrote (as was conceived) ſomewhat againſt the Claim of the *French* to ſeveral Territories) upon a publick Audience at *Liſle*, they were anſwered by Duke *Philip*, *That* Oliver was *Steward of his Houſe, a* Burgundian *by Birth, and in no reſpect ſubject to the Crown of* France; notwithſtanding if it could be proved that he had ſaid or done any thing againſt the King's *Honour*, he would ſee him puniſhed according as his faults ſhould deſerve.

VIII. But admitting that ſuch an innocent Perſon ought not to be delivered up, whether he is bound to yield himſelf; by ſome it is conceived he ought not, becauſe the nature of civil Societies, which every one hath entred into for his own Benefit, doth not require it; from which it follows, that though ſuch Perſons are not bound to that by Right, properly ſo called, yet it doth not follow, but in charity he ſeems bound to do it; for there may be many Offices not of proper Juſtice, but of Love, which are not only performed with praiſes, but alſo cannot be omitted without blame; and ſuch indeed is the Act of ſuch a Perſon's voluntary yielding up himſelf, preferring the Lives of an innocent Multitude before his own. *Cicero* for *P. Sextus*, *If this had happened to me ſailing with my Friends in ſome Ship, that Pirates ſurrounding us ſhould threaten to ſink us, except they would deliver me, I would rather have caſt myſelf into the Sea to preſerve the reſt, than to bring my Friends either to certain Death, or into great danger of their life.*

Idem de finibus 3. Vir bonus & ſapiens, & Legibus parens, & civilis officii non ignarus, utilitati omnium plusquam unius alicujus, aut ſuæ conſulit. And in *Livy* there is a moſt excellent Saying of ſome *Moloſſians: Equidem pro Patria qui lethum oppetiſſent ſæpe fando audivi; qui patriam pro ſe perire æquum cenſerent, hi primi inventi ſunt.* Liv. *lib.* 45.

IX. But whether ſuch an innocent Perſon may be compelled to do that which perhaps he is bound to do, may be a queſtion; rich Men are bound by the precept of Mercy to give Alms to the Poor, yet cannot be compell'd to give: it is one thing when the parts are compared among themſelves, another when Superiors are compared

to

to their Subjects; for an Equal cannot compel his Equal, but unto that which is due by right ſtrictly taken; yet may a Superior compel his Inferior to things which Virtue commands; in a Famine to bring out Proviſions they have ſtored up, to yield him * to Death that deſerts his Colours, or turns Coward, to mulct thoſe that wear exceſſive Apparel †, and the like. *Phocion*, pointing to his dear Friend *Nicocles* ſaid, *Things were come to that extremity, that if* Alexander *ſhould demand him, he ſhould think he were to be delivered up.* It hath ſeemed that ſuch an innocent Perſon might be deſerted and compelled to do that which Charity requires; but the late ROYAL MARTYR ſeemed of another Opinion, when he came to die, in the Caſe of the *Britiſh Protomartyr* Strafford.

* *Leg. Deſert.*
†*Coke Inſtit.* 3. *fol.* 199.
Plutarch Phocion: Fides agi viſa deditos non prodi. Liv. *l.* 7. *Statius judicemus eſſe paucos aliquos mala ferre, quam immenſam multitudem.*

The Son of *Pompey* was ſo worthy a Son of ſo great a Father, that he contended with *Anthony* and *Auguſtus* about the *Empire of the World*; this *Pompey* entertaining *Anthony* and *Auguſtus* in his Galley, the Captain which commanded it, demanded leave of him to weigh Anchor and to carry away his Gueſts, and to make his Rivals Priſoners: he anſwered him, that he ought to have done it without telling him of it, and ſhould have made him great without having made him forſworn: Certainly an honeſt Perſon will never be of the Mind of this Captain: therefore in ſuch extremities *Counſellors*, either for high advantages, or in the great neceſſities of their *Prince* ſhould ſerve their Maſters with their Eſtates and Goods, but not with their Honour and Conſcience.

X. But this delivering up does in no reſpect extend to Sovereign Princes, who are by Divine Permiſſion unfortunately driven out of their own Country; and therefore memorable is the great Treaty commonly called by the *Flemings*, *Intercurſus Magnus*, where there was an expreſs Article againſt the reception of the Rebels either of *Henry* VII. or of the *Arch-Duke* of *Burgundy* by others, purporting that if any ſuch Rebel ſhould be required by the Prince, whoſe Rebel he was, of the Prince Confederate, that forthwith the Prince Confederate ſhould by Proclamation command him to avoid the Country, which if he did not within fifteen days, the Rebel was to ſtand proſcrib'd, and put out of Protection. But a Prince, or one that hath a Sovereign Power, and had been contending for his Right, but Succeſs not crowning his hopes, occaſioned his flight, hath always been excepted; to deliver up ſuch, is even againſt Nature and the Majeſty of Power; and therefore it is very remarkable what attempts were made for *E.* 4. *H.* 7. nay in the very Treaty of

12 *H.* 7. *Bacon*'s *Henry* the Seventh, *fol.* 162.

of *Intercurſus magnus* it is memorable that at that time *Perkin Warbeck* was contending with *H.* 7. for the Crown of *England* by the name of *Richard* Duke of *York*, younger Son and ſurviving Heir Male of *Edward* the Fourth. My Lord *Bacon* does take a particular notice, that *Perkin Warbeck* in that very Treaty was not named nor contained, becauſe he was no Rebel, but one that contended for the Title. Afterwards when *Perkin* was fled into *Scotland*, and there received by the *Scottiſh* King, *Henry* the Seventh ſent to have *Perkin* delivered up, and it was one of the principal Inducements of the King to accept of a Peace upon that condition, giving for an argument, that *Perkin* was a Reproach to all Kings, and a Perſon not protected by the Laws of Nations; but the *Scotch* King peremptorily denied ſo to do, ſaying, *That he (for his part) was no competent Judge of* Perkin's *Title, but that he had received him as a Suppliant, protected him as a Perſon fled for refuge, eſpouſed him with his Kinſwoman, and aided him with Arms, upon the belief he was a Prince, and therefore he could not now with his Honour ſo unrip, and (in a ſort) put a lye upon all that he had ſaid and done before, as to deliver him up to his Enemies.* This was ſo peremptorily inſiſted on by the *Scotch* King, that *Henry* the Seventh was at length contented to wave the Demand, and conclude a Peace without that Article; notwithſtanding the King of *Scotland* had often in private declared, that he ſuſpected *Perkin* for a Counterfeit.

Lord *Bacon's* *Henry* the Seventh. *fol.* 176.

XI. Perſons that have wronged or defrauded Kings of their Revenue, eſpecially in *England*, upon Letters of Requeſt to thoſe Princes whither they have fled, have been delivered up.

Some *Florentine* Merchants of the Society of the *Friſcobaldi*, being made Collectors and Receivers of the King's Cuſtoms and Rents in *England*, *Wales*, *Ireland*, and *Gaſcoigne*, running away with thoſe Monies, together with all their Eſtates and Goods, for *Rome*, the King ſent his Letters of Requeſt to the *Pope*, deſiring that they might be arreſted, and their Perſons and Goods ſeized, and ſent over to ſatisfy him for the damages he and his Subjects had ſuſtained by them, promiſing not to proceed againſt them to the loſs of their Limbs or Lives. Upon which Letters, the *Pope* ſeized on their Goods, and not long

Rott. Romæ An. 4. *E.* 2. *M.* 17. *Dorſo.*

long after the King writ for the ſeizing of their Perſons, for anſwering of other frauds and injuries. *Rott. Romæ 4. E. 2. M. 16. Dorſo.*

The like was done for one *Anthony Fazons*, who had received 500 *l.* of the King's Monies, and running away with it to *Lorraine*, the King writ to the ſame *Duke*, deſiring that ſearch might be made, and his Perſon ſeized upon, and his Goods ſecured in every place within his Territories, till he ſhould ſatisfy the ſaid 500 *l.* *Clauſ. 8. E. 2. M. 31. Dorſo pro Rege.*

CHAP. XII.

Of Contribution paid by Places Neuter to both Armies in War.

I. *Of force uſed to Neuters whether lawful*

II. *Of Neuters, their duty conſider'd in reference to either of the warring Parties.*

III. *Conſiderations general touching the ſame, and the chief matters that are objected by thoſe that ſcruple thereat.*

IV. *The Caſe ſtated generally in the queſtion propounded to our* Saviour *of paying tribute to* Cæſar.

V. *In the payment of Contribution to an Enemy, what is neceſſary to be diſtinguiſhed in the beginning of a War.*

VI. *Of a ſecond diſtinguiſhment drawn out of the firſt, of ſuch payments, when a War is actually formed.*

VII. *Where a man pays, but miſlikes the cauſe, whether excuſable, the War not yet actually formed in place.*

VIII. *Where a Country is fully poſſeſt, whether payment then is lawful.*

IX. *Of the ſtate of thoſe that live on Frontiers, their condition conſidered in reference to procure their Peace by Contribution.*

X. *Of interdiction by him to Places from whom faith is owing, Contribution notwithſtanding being paid, whether the ſame creates an offence in them.*

XI. *Of the genuine Conſtruction of ſuch interdictions according to the true intention of the ſame.*

XII. *Of the impunity and puniſhment that ſuch innocent Offenders may be ſubjected to, in caſe of being queſtioned for the contempt by their right Governors.*

I. IT is manifeſt there is no Right of War over Neuters in War; yet becauſe by occaſion of the War many things are uſually done againſt ſuch (Borderers eſpecially) on pretence of neceſſity, there can be no Excuſe for the act, unleſs it be apparent Neceſſity, and that the ſame ought to be extreme, for then it may give a Right over

over what belongs to another Man; for in ſuch caſe, if the neceſſity be manifeſt, there may be ſuch a proportion exacted as the neceſſity requires, that is, if the Cuſtody ſuffices, the Uſe of the thing is not to be taken; if the Uſe, not the Abuſe, be neceſſary, yet is the Price of the thing to be reſtored. *Moſes*, when the higheſt neceſſity urged him and the People to paſs through the Land of the *Idumeans*, firſt he ſaith, *he would paſs along the high-way, and not divert into their Corn-fields or Vineyards; if he had need but of their Water, he would pay a price for it.* The worthy Captains, both *Greek* and *Roman*, have done the like: In *Xenophon* the *Greeks* with *Clearchus*, promiſe the *Perſians* to march away without any damage to the Country, and if they might have neceſſaries for Money, they would take nothing by force. This Virtue is often commended in * *Beliſarius* by *Procopius* his Companion and Witneſs of his Actions.

* See to this purpoſe his excellent Speech to his Soldiers near *Sicily*, when he marched into *Africk*, and the Narration of his March thorough *Africk*. *Vandal.* 1.

II. And as the Law doth preſerve the Eſtates and Territories of ſuch Neuters, or thoſe that abſtain from War, ſo on the other hand ſuch ought to do nothing for either Party, but eſpecially for him who maintains a bad Cauſe, or whereby the Motions of him who wageth a juſt War may be retarded; and in a doubtful Caſe they ought to ſhew themſelves equal (as we have mentioned elſewhere) to both in permitting paſſage, in affording Proviſion for the Legions or Navies, and in not relieving the Beſieged. *It is the duty of the* Athenians, *if they would not ſide with any Party, either to prohibit the* Corinthians *from raiſing Soldiers out of* Attica, *or permit them to do the like.* So the Emperor and Confederate Princes of the Empire, with the Cantons of *Switzerland* in the late *German* War, and ſo of the King of *England*, who was ſo careful to preſerve the Neutrality, that he iſſued forth his Proclamations to prohibit all Perſons, of what Condition ſoever, to become Soldiers in the Service of any of the warring Princes. It was objected by the *Romans* againſt *Philip* King of the *Macedonians*, That the League was violated by him two ways, *both becauſe he did injuries to the Fellows of the Roman People,*

Exemplum nobile vide apud Parutam, lib. 8. *Thucydides l.* 1.

People, and becauſe he aſſiſted the Enemy with Aids and Money. The ſame things are urged by *Titus Quintus* in his Conference with *Nabis*, Yet thou ſayeſt, *I have not violated you, nor your Friendſhip and Society,* how often ſhall I prove the contrary? In ſhort, wherein is Friendſhip violated? By theſe two things eſpecially: *If thou haſt my Friends for Enemies: if thou art a Friend to my Enemies: he is reckoned an Enemy who ſupplieth them with what is uſeful for the War.* *Procop. Goth. 1.*

III. But now there are many things that are uſeful for the War worthy of ſome conſideration, the which are not ſo accounted at this day by the Laws of Nations; underſtand me, That I call the *Laws of Nations*, which is at this day univerſally practiſed, as namely the ſupplying either or both of the warring Parties with Monies, or that which is called *Contribution*. Now if the Minds of the Subjects cannot be ſatisfied by the declaration of the Cauſe, it will certainly be the Office of a good Prince or General rather to impoſe upon them Contribution than Military Service, eſpecially when that Prince or General hath an Army ſufficient to proſecute his Deſigns, the which a juſt Commander may uſe as God doth the ready Service of the Devil. *Sil. in Verb. bellum p. 1. n. 7. circa finem.*

The moſt excellent *Grotius* having moſt incomparably treated on, and cleared all the important Objections againſt a juſt War, together with the Incidents of the ſame; yet this main one of *Contribution* or paying to both Armies, whether lawful, he hath not touched in any other words but theſe, *Quod ſub tributo utrique parti præſtando factum dià in Belgico, Germanico bello nuper vidimus, eſtque id conſentaneum mori veteri Indorum* †: and ſo cites a ſaying in *Diodorus Siculus* *, of the Peace that thoſe People maintained in their Poſſeſſions by reaſon of ſuch Contributions. But to many Perſons this Inſtance, without further ſcrutiny, proves inſufficient; for there are many, who not finding this Liberty in their Conſciences, unneceſſarily chuſe rather to give up their Bodies to reſtraint, and to abandon their whole means of Subſiſtence in this World, both for themſelves and their Children, (which ought not fondly to be done, *unleſs we would be worſe than Infidels*, as St *Paul* ſaith) they ground their Reſolution on this Reaſon, that they know not whether the Monies they give may not

† *Grot. de Jure Bell. ac Pacis, lib. 3. cap. 12. §. 4. n. 2.*
* *Lib. 2.*

not furniſh to the Deſtruction of many Innocents, and perhaps the juſt Magiſtrate; yea, and the total ſubverſion and ruin of their Country, Liberty, and Religion: and therefore though Men give and beſtow their own where they pleaſe, yet in ſuch Caſes they may not; therefore it may not be impertinent to examine whether theſe be neceſſary Scruples in themſelves, and ſuch as admit of no exception of Liberty, or whether thoſe Scruples be reaſonable, or indeed meer ſcandal.

IV. The *Scribes* and *Phariſees* ſought two ways to entrap *Our Saviour*; one was if he had blaſphemouſly taught a new Religion, and a new *God*, (*viz.* himſelf) they hoped the People would be provoked to ſtone him Deut. xiii. for this, according to the *Hebrew Law*: The other was, to bring him within the compaſs of *Treaſon*, as if he could not lead great Multitudes after him without traiterous deſigns; but this Gin failed too, becauſe the Multitudes which followed him were always ready to defend him. However, when he was at *Jeruſalem*, where the *Roman* Troops and *Prætor* were, they thought they had him ſure, by propounding this Subject to him:

Is it lawful to pay Tribute to Cæſar? Which was as much as to ſay, We who are deſcended from *Abraham*, and are the peculiar People, to whom God hath given the large Privileges of the Earth at home, to bathe ourſelves in Rivers of Milk and Honey, to have full Barns and many Children; yea, that GOD himſelf would be adored in no other place of the World but at this our *Jeruſalem*, and that abroad we ſhould triumph over the *Barbarous* and uncircumciſed World by virtue of that *Militia*, which he never ordered for any but ourſelves; how are we then in Duty or Conſcience to ſubmit now to the Ordinances of the *Uncircumciſed Romans?* Or what Right can he have to exerciſe ſupreme Juriſdiction over us, the privileged *Seed of* Abraham, by levying of Taxes on our Eſtates and Lands, which GOD himſelf laid out for us, by which means the *Emperor* and *Senate* hold this very Temple in ſlavery, and inſult over our very Conſciences and Religion, by defiling our very Sacrifices with the mixture of impure Blood; which as they are the price of our Blood, and a Tribute far above *Cæſar*'s, (payable in no other Place but this Temple, which GOD himſelf built) ſo our

Blood

Blood ought not to ſeem too dear to be ſacrificed for the Liberty of theſe: and though the *Roman State* could pretend, yet what can this *Cæſar* pretend? Every man's Conſcience knows that it was but the other day he uſurpt over the *Senate*, in which reſides the true Juriſdiction of *Rome*; and if that were otherwiſe, yet how can he pretend to a Title unleſs Poiſon be a Pedigree, or violent Uſurpation a juſt Election, by which he who is but the greateſt Thief in the World would now paſs for the moſt Sovereign and Legitimate Prince? How then are we in Conſcience obliged to pay Tribute to this *Cæſar*? Though thoſe Lawyers thought in their Conſciences that they were not to pay it, and that *Our Saviour* likewiſe, as a *Jew*, thought ſo too; yet they ſuppoſed he durſt not ſay ſo much in the crowd; nor yet deny it by ſhifting it off with Silence, leſt the *Roman* Officers ſhould apprehend him: But when *Our Saviour* ſhewed them *Cæſar*'s Face upon the Coin, and bade them *Render to Cæſar that which was Cæſar's, and to GOD that which was GOD's*; His Anſwer ran quite otherwiſe, not as ſome would have it, that by a Subtilty he anſwered not to the Point propoſed, for then the ſenſe of the whole Text would ſound very ill in ſuch Terms, *viz.* If there be any thing due to *Cæſar*, pay him it, and if any thing is due from you to GOD, then pay it likewiſe; This had been a weakening of GOD's Right for *Cæſar*'s, and to have left a deſperate doubting in a neceſſity: 'Tis beyond all cavil that *Our Saviour*'s Opinion was poſitive for paying of *Tribute* to that *Cæſar*, because *de facto* he did pay it; and the plain Reaſon of it appears evidently in this his Anſwer: *Cæſar*'s Face was upon the Coin, that is to ſay, *Cæſar* by Conqueſt was in Poſſeſſion of that Coin, by poſſeſſing the place where he obliged them to take it; coining of Money being one Prerogative of Soveraign Power.

Matt. xxii. 20.

Coke 3. *Inſtit.* *fol.* 16, 17.

V. But to come more cloſe to the Queſtion, whether Contribution may lawfully be paid: Firſt, we are to make a Difference betwixt *perferre & inferre bellum*; the one is active, and properly at the beginning of a War, and in a place where yet no War is, and where its Cauſe only, and not its Effects can be conſidered; in this caſe every thing ought to be very clear for Warrant of a Man's Conſcience, becauſe of the Calamities which he

helps to introduce, and is in ſome manner the Author of: the other is paſſive, and there where War, or the Power of War is actually formed, which is the Caſe of this Diſcourſe.

VI. Secondly, we are to diſtinguiſh betwixt that which cannot be had, nor the Value of it, unleſs we actually give it, and that which may be taken by the Law of War whether we contribute or no.

VII. Moſt certain it is, though a War be not yet actually formed in a place, yet a ſcrupling Conſcience, which likes not the Cauſe, may be excuſed in contributing to it in this one Caſe, *viz.* If ſome number of Men, able to take what they aſk, demand (with an armed power) the payment of a certain ſum to be employed in War, then in ſuch a caſe, the Man, whom we ſuppoſe, may pay it as a Ranſom for his Life, or give it as a Man doth his Purſe, when he is ſurpriſed in the Highway, becauſe to this Man it is as much as if the whole Country were poſſeſſed with an armed Power. So ſeveral *Dutchies* and *Seigniories* dependent on the *Empire*, did in the War between them and the Crown of *France*, pay Contribution.

4 *H.* 4. 2.

Procopius in the third of *Goth.* of *Totilas* when he beſieged *Rome*, ſaith, *Agricolis interim per omnem Italiam nihil mali intulit; ſed juſſit eos ita, ut ſoliti erant, terram perpetuo ſecuros colere, modo ut ipſi* Tributa *perferrent:* This, ſaith *Caſſiodore*, is the greateſt Praiſe. 12. 15.

But if the Perſon or Country be not for the time in full Poſſeſſion of him whoſe Cauſe he ſcruples at, and that he or they have not a probable fear of extreme danger, nor as probable aſſurance, that without his help the thing demanded nor its value can be taken from him or them, then there is little Excuſe remains for the Act, becauſe the very Act (which his Conſcienee diſlikes) participates more of Action than of Paſſion.

VIII. But where a Man or City is fully poſſeſſed by an invading Power (be the ſame juſt or unjuſt) from whom he or they cannot fly, nor remove their Subſtance, moſt certain the payment of Contribution is no gift, any more than he (as above) who with his own Hands being ſet upon by Pirates or Robbers, puts his Purſe into their Hands; for the Laws calls not that a *Gift*, nor excuſes

the Party from taking it: And altho' the Parties may employ the ſame to the Deſtruction perhaps of Innocents, and the like; yet that is an Action out of their Power that give, as far as Winds and Tempeſts are, to which two, as we contribute nothing, ſo we cannot be ſcrupulous in our Conſciences concerning their bad Effects; nor is the ſame repugnant to the *Canon Law*, (which teaches us humanity, and the imitation of all their virtues) and therefore Perſons, whoſe Lives are innocent and harmleſs, ought not to be ſubjected to danger or plunder, which hardly can be avoided without Contribution or Tribute.

44 *E.* 3. 14. 4 *H.* 5. 3. *Coke* 3. *Inſtit. fol.* 68.

C. 2. *de Treug. & Pace. Nic. Damaſc.*

IX. Again, thoſe that live on Frontiers, whoſe condition is more ticklish and deplorable, becauſe they are not fully poſſeſt nor taken into the Line of either Party, theſe live as it were in the Suburbs of a Kingdom, and enjoy not the Security or Privileges of others, yet ſuch Perſons may lawfully contribute to both; for though they be but partly poſſeſt by one, and partly by the other, in reſpect of their ſudden abandoning them, yet both Parties have the Power of deſtroying them wholly; whereſore thoſe former Reaſons which juſtify thoſe fully poſſeſt, do alſo acquit the Payments of theſe; for their condition here is more calamitous, ſeeing they are really but Tenants at Will, expoſed to a perpetual Alarm, and that both Parties wound one the other only through their ſides, as thoſe this day that are ſituate between *France* and *Germany*; for being perhaps Neuters in the War, they are in that caſe by the Law of Arms to ſhew themſelves equal to both, in permitting of Paſſage, in affording Proviſions for the Armies, and in not relieving the Beſieged.

The quiet of the World cannot be had without Arms, no Arms without Soldiers Pay, nor Pay without Contribution.

Tacit. Hiſt. 4.

Extemplum nobile vide apud Parutam, lib. 8. *Grot. l.* 3. *c.* 17.

X. Nor can the Interdiction of him to whom ſuch owe Faith and Obedience, any ways create the ſame an Offence, ſince the declared Wills of our Governors cannot make all thoſe of our Acts Sins, when we obey or ſubmit to that Power, which againſt our Wills (as much as againſt theirs, and it may be with more of our Miſery) hath diveſted them of the Power of their Rights, and deprived us of the Power of their Government; and by the Laws of War, they who have overcome, ſhould govern thoſe whom they have overcome; and therefore whatſoever

Grot. de Jure Belli ac Pacis, l. 3. *c.* 8. § 11. *c.* 12. § 4.

ſoever is exacted by the Conquerors, may juſtly be paid by the Conquered.

And ſince Princes by their Commands cannot change the nature of human Condition, which is ſubject naturally to thoſe fore-mentioned Changes, it would ſeem exceeding hard to oblige us to almoſt moral Impoſſibilities; and though thoſe Political Commands were as Laws, yet doubtleſs they ought not to be obliging, but according to the Legiſlative Rule, which is *cum ſenſu humanæ imbecillitatis*, this is that which is called the preſumed Will * of a Governor, or the Mind of a Law: for in extreme neceſſity it is to be preſumed, that both their Wills proceeding from the Rigour of what they have declared, rather than by holding to that which is their ſuppoſed Right, introduce certain Miſeries and Confuſion without receiving any Benefit thereby to themſelves. Nor could they of *Utrecht*, and others of the conquered Cities in *Holland*, abandoned afterwards by the *French*, and entirely preſerved from Deſtruction, be condemned by their *Confederates*, for the Sums by them promiſed to the Enemy for the Preſervation of the ſame.

Jure hoc evenit ut quod quiſque ob tutelam corporis ſui, jure feciſſe exiſtimetur.

** Leg. ut vim. D. de juſt. & jur.*

Neither *are ſuch Commands or Interdictions without their ſenſe and profit, though they be not poſitively obeyed*; for thereby Governors ſhew to all the World, that they renounce no part of their Right, no, though it be there where they cannot exerciſe any part of their juſt Power.

And that is apparently evinced by the Laws of Leagues; for ſuch being made, the ſame remains, although the ſame King or his Succeſſor be driven out of his Kingdom, for the Right of the Kingdom remains, although he hath loſt the Poſſeſſion. *Grotius, lib.* 2. *cap.* 17. §. 19.

XI. Now the true Intention of ſuch Commands or Interdictions is, that the Enemy ſhould not by any means be aſſiſted or ſtrengthened; but if ſuch Prohibitions ſhould be obeyed, nay at ſuch a time, when they and all their ſubſtance are abſolutely poſſeſt by the Enemy, moſt certain ſuch Commands daſh againſt themſelves, and the one countermands the other; for if they refuſe to ſubmit in ſuch a caſe, then they do that which advantages their Enemies, becauſe at that time they will take all, whereas in Caſe of Submiſſion they aſk but a part.

XII. In

XII. In all Wars there are always ſome, by whoſe Diſaffections Enemies gain more than by their Compliance, juſt as Phyſicians do by Diſtempers.

And although, by variety of Succeſſes, the juſt Governor ſhould after recover that place, which ſo ſubmitted to the Power of their Enemies, and for that reaſon ſhould puniſh thoſe that were pliable to extreme Neceſſity; yet it follows not upon that, that they who ſo conformed, ſinned, or did that which was abſolutely unlawful; for we well know that reaſon of State often calls for Sacrifices where there is no fault to expiate: *Oſtraciſm* and *Jealouſy* may make away thoſe who are known to deſerve moſt; but in ſtrict Right (which is the Term of this Queſtion) the juſt Governor ought to look upon them as more Unfortunate than Faulty.

In Republica idem eſt nimium, & nihil mereri.

CHAP. XIII.

Of the Naval Military part.

I. *The Advantage that Princes have by a good Commander.*
II. *The Love that naturally proceeds from the Mariners to thoſe that are valiant and generous.*
III. *Princes in prudence ought not to liſten too much to the Complaints againſt Commanders.*
IV. *Of the Faults generally conſidered in Soldiers and Mariners.*
V. *Of the puniſhments that generally wait on ſuch Offenders.*
VI. *Of Drunkenneſs, Swearing, and other ſuch ſort of Impieties, not to be ſuffered in Fleets.*
VII. *Spies, 'tis lawful to uſe them by the Laws of Nations, but being deprehended, are to ſuffer Death; and how they are to be dealt withal by the Laws of* England.
VIII. *It is not lawful for a Friend or Neuter to relieve an Enemy, and Perſons ſo offending, how puniſht.*
IX. *Ships taken as Prize, the Ship, Papers, and other matters concerning the ſame, are to be preſerved.*
X. *Of things taken and acquired in War; how the Right of them becomes veſted in the Captors, and how that is to be underſtood by the Law of Arms.*
XI. *To ſteal the Cables or other Furniture of the King of* England's *Ships, how puniſhable at this day.*
XII. *Ships ſurrendred or voluntarily yielded, how to be dealt with, and to thoſe that ſhall reſiſt, if entred by force, whether quarter may be refuſed.*
XIII. *Ships of War generally ought not to be yielded; but if entred or diſabled, whether they may not accept of Quarter, ſtanding with the Oath called* Sacramentum Militare.

XIV. *Of obeying Orders, the ſame ought punctually to be followed; and if broken, though the act ſucceeds well, whether the ſame ſubjects not the Actor to puniſhment.*

XV. *Of the Obligation incumbent on Commanders and Soldiers, to behave themſelves valiantly, and the right of ſlaying an Enemy, where lawful.*

XVI. *Ships how oblig'd by the Law of Arms to the Aſſiſtance of one another; and of the duty of thoſe that have Fleets under their Convoy.*

XVII. *An Enemy beaten ought to be purſued, and how far it is lawful to ſlay ſuch flying with their lives in their hands, by the Law of Arms, and how the reeking ſword ought to be governed.*

XVIII. *Perſons exempted from the ſword by the Laws of Nature, Nations, Civil and Canon, and by the Municipal Laws of ſome Countries.*

XIX. *Mutinying how eſteemed, valued and puniſhed at this Day by the practice of Armies, and by the Laws of* England.

XX. *Whether it be lawful to decoy the Subjects, Soldiers, or Mariners of an Enemy to forſake his Prince or General, and to bring over his Men, Ships or Arms, and where by Law they may be received; and how ſuch Deſerters may be puniſhed by the Laws of Nations and of* England.

XXI. *Of Seducers, Meſſage-carriers and Decoyers of Soldiers, how to be handled by the Law of Arms.*

XXII. *Of thoſe that ſhall diſobey or ſtrike their ſuperior Officers, how puniſhable.*

XXIII. *Of mutinying, and thoſe that ſhall act in the ſame, how puniſhed, though they have a juſt Cauſe of Complaint.*

XXIV. *Of the Care incumbent on Commanders and Maſters of the Great Ships, in reference to their ſafety, and the puniſhment of wilful burning and deſtroying them.*

XXV. *Of the general Offences at Sea, how puniſhed.*

XXVI. Court Martials *how erected, and what Operation their Judgments have, and upon whom.*

XXVII. *Judges and Advocates Power in reference to giving an Oath, and the* Admiral's *Power how limited in the puniſhing of Offences.*

XXVIII. *Of maimed Soldiers and Mariners, and the Proviſions that the Laws make for them at this Day.*

XXIX. *Of* Triumphs.

I. AN excellent *General* is an Evidence of the Fortune of a *Prince*, and the Inſtrument that occaſions the Happineſs of a Kingdom; and therefore when God makes choice of a Perſon to repair the Diſorders of the World, or the Good of a particular State, then is his Care ſhewed in the furniſhing him with neceſſary Principles to undertake great Matters; the Thoughts are put in his Soul by that eternal Commander to execute, he troubles and confounds his Enemies, and leads him as by the Hand to Victories and Triumphs: And one of the greateſt Expedients whereof he ſerves himſelf for this Purpoſe, is to raiſe unto him excellent Men, both in Courage and Conduct,

duct, to whom he communicates his Care, and who help him to bear the Weight of Affairs. *Alexander* had never conquered *Aſia*, or made the *Indies* to tremble, but for *Ephestion*, *Parmenio*, and *Clitus*; *Cæſar* gained many a Battle by his Lieutenants; and the faireſt *Empire* of the World, which Ambition and the Evil of the Times had divided into three Parts, was reduced under the Dominion of *Auguſtus* by the Valour of *Agrippa*; *Juſtinian* triumphed over *Perſia*, and deſtroyed the *Vandals* in *Africa*, and the *Goths* in *Italy* by the Aid of *Beliſarius* and *Narſes*: And it is moſt certain, that *Noble Commanders* are the Glory of their *Princes*, and Happineſs of the *People*; on the other Hand, Baſe, Cowardly and Treacherous Generals are the Shame of the one, and the Deſpair of the other.

II. Hence it is, that Soldiers and Mariners draw their Lines of Love, even to the Mouths of Cannons with a good General, but Mutiny and Hate to the main Yard end againſt one that is Bad; for to obey them who are not their Soveraigns when they do them Hurt, when they inſult and are cruel in cold Blood, and Baſe, Cowardly or Treacherous in Battle, is a ſad Neceſſity for them, and a hard Eſſay of Patience; yet muſt they be obeyed, and the Soldiers and Mariners muſt not rebel or repine, but ſubmit till their Soveraign redreſſes their Misfortunes.

III. Again, *Princes* ought not to liſten too much to the mutinous Demands of the *Crew*, or any others whoſe Ambition watches their Ruin, whereby to conceive Anger againſt their *Commanders*; for it is eaſier to purge out the Choler and Diſcontent that is got under the Hatches, than to provide *Commanders of Conduct*, Courage, and Faithfulneſs to govern their Expeditions, *Beliſarius*, that moſt excellent Commander, who had no other Crime than his *Reputation*, and was not culpable, but that he was Powerful, having conquered *Perſia*, ſubdued *Africa*, humbled the *Goths* in *Italy*, led Kings in Triumph, and made appear to *Conſtantinople* ſomewhat of *Old Rome*; an *Idea* of the antient Splendor of that proud *Republick*; after all his eminent Services, this *great Perſon* is abandoned to *Envy*: A Suſpicion, ill grounded, deſtroys the Value of ſo many Services; and a ſimple *Jealouſy of State*, wipes them out of the Memory of his Prince: but he

Procopius Hiſt. Vandal. in Vita Beliſarii.

Vide Sir *Walter Ralegh's* Hiſt. Vol. II. p. 782. *Edit.* 1736.

The Ingratitude that hath been ſhewn by Princes to many Brave and Noble Generals and Commanders, there particularly enumerated.

reſts not there, for the Demeanor had been too gentle, if Cruelty had not been added to Ingratitude; they deprive him of all his Honours; they rob him of all his Fortune; they take from him the Uſe of the Day and Light, *they put out his Eyes*, and reduce him to the Company of Rogues, and the miſerable *Beliſarius* demands a Charity; even that *Beliſarius* the chiefeſt General of his Age, and the *greateſt Ornament of the Empire*, who after ſo many Victories and Conqueſts, accompanied with ſo high and clear a Virtue, and in the midſt of *Chriſtendom*, was reduced to ſo abject and low a Miſery.

Nor was this cruel and haſty reckoning of *Juſtinian* let ſlip without a cruel Payment; for *Narſes*, who was as well a Succeſſor in Merit as in Authority to *Beliſarius*, having notice of a Diſdain, conceived likewiſe againſt him upon a ſingle Complaint, reſolved not to expoſe himſelf as a Sacrifice to their Malice; and therefore thinking it better to ſhake off the yoke, than ſtay to be oppreſſed, ſoon ſpoiled the Affairs of *Juſtinian*, for the *Goths* revolted, and Fortune would not forbear to be of the Party which *Narſes* followed, nor to find the *Barbarian* where ſo brave a Captain was engaged. Therefore not one or many Faults are to be liſtened to againſt Commanders, but patiently heard and redreſſed, not to diſgrace or loſe them; for ſuch having committed a Fault, yet being admoniſhed by love, may endeavour by future Services to make recompence by ſome noble Exploit; but diſgraced, become Inſtruments often of Danger and Ruin to their Superiors.

IV. Soldiers and Mariners Faults are either proper to themſelves, or common with others.

Thoſe are common with others which other Men fall into, and are corrected with like ordinary Proceedings as other Crimes of like Nature, as Manſlaughter, Theft, Adultery, and ſuch like.

Thoſe are proper which do purely appertain to the *Naval Military* part, and are puniſhed by ſome unuſual or extraordinary Puniſhment: As are theſe; Not to appear at the over-muſters or calling over the Ship; to ſerve under him he ought not to ſerve; to vage or wander long from on Ship-board, altho' he returned of his own accord; to forſake his Fleet, Squadron, Ship, Captain, Commander,

§. *De re milit. De caſtrenſi peculio, & C. eodem tit. l.* 12. *C. de erogatione militaris annonæ & C. de veſt Militari.*

mander, or Officer; to leave his ſtanding to fly over to the Enemy; to betray the Fleet, Squadron, or Ship; to be diſobedient to his ſuperior Officers; to loſe or ſell his Arms, or to ſteal another Man's; to be negligent in his Officer's Command, or in his Watch; to make a Mutiny; to fly firſt out of the Battle, and the like, which are very frequently ſet forth in the Titles of the *Digeſt* and *Code* of Military Affairs, and other like Titles which accompany them.

Arrian, who wrote the Life of *Alexander the Great*, obſerves, *Every thing is counted an Offence in a Soldier, which is done contrary to the common Diſcipline*, as to be neglectful, ſtubborn, and ſlothful.

V. The Puniſhment wherewith Soldiers and Mariners are corrected, are thoſe corporal Puniſhments, or a pecuniary Mulk or Injunction of ſome Service to be done, or a motion and removing out of their Places, and ſending them away with ſhame.

By capital Puniſhment is underſtood for the moſt part Death, or at leaſt beating with *Cat with Nine Tails*, as they commonly term it, *Ducking*, *Wooden-Horſe*, *Gauntlet*, and ſuch like, unleſs happily it be pardoned, either for the unſkilfulneſs of the Mariner or Soldier, or the Mutiny of the Crew or Company, being thereto drawn by Wine, Wantonneſs, or for the Commiſeration or Pity of the Wife and Children of the Party offending; all which is left to the Diſcretion of the *Lord Admiral*, and others the Supreme Commanders or Captains.

VI. It is neceſſary that in Armies and Fleets, all manner of Impiety ſhould be prohibited, eſpecially that of Swearing and Curſing; for ſuch Sins are ſo fooliſh, that they unawares trip Men into Damnation, rendring Men worſe than Beaſts, by how much the more they court that Vanity of Sin, without any of the appendent Allurements which other vitious Actions are accompanied with, the ſame in the end teaching Men to diſavow GOD in their diſcourſe and actions, by their intemperate and inconſiderate invoking him in their Oaths. *Againſt ſuch, as alſo againſt thoſe that ſhall give themſelves up to Curſing, Execrations, Drunkenneſs, Uncleanneſs, or other ſcandalous* 13 *Car.* 2.
actions in Derogation of God's Honour, and corruption of Good cap. 9. *Art.* 2.
Manners; Fines and Impriſonment, or ſuch other Puniſhment

may

may be inflicted on them by a Court Martial, which is now reduced to the Forfeiture of one day's Pay; but for Drunkenneſs, the ſame extends not to Commanders, or other Commiſſion and Warrant Officers, for they upon Conviction before the *Admiral*, ſhall be rendered uncapable of their Command.

By Order of his Royal Highneſs the Duke of *York*, 1666.

Artic. 1.

And a Lyar convicted on Ship-board, ſhall be hoiſted upon the main Stay with four Braces, having a Broom and Shovel tied to his Back, where he ſhall continue an Hour, every Man crying, *A Lyar*, *A Lyar*, and a Week following, he ſhall clean the Ship's Head and Sides without board, according to the antient practice of the Navy; if he receives greater Wages than for an able Sea-man, then half a day's Pay.

VII. By the *Laws of Nations*, *Spies* may be ſent to ſurvey the Enemy's Force, Fleet, Station, or Squadron, and make diſcovery of whatſoever may give advantage to the Perſons ſending: So *Moſes* and *Joſhua* did into the *Holy Land*. On the other hand being deprehended, they are to be put to death, as *Appian* ſaith. But whether it be lawful to make Spies of the Subjects of that Prince with whom the War is begun, hath been ſome doubt: It is not lawful for a Subject to kill his King, nor to yield up his Ships of War without publick Council, nor to ſpoil his fellow Citizens, to theſe things it is not lawful to tempt a Subject that remains ſuch; nor may any reply, That to him who impelleth ſuch a Man to a wicked Act, that Act, as namely the betraying of his Enemy, is lawful; no body doubts, he may indeed do it, but not in that manner; but yet if a Subject will voluntarily deſert his Prince and Country, *i. e.* to enter into a Correſpondency with the Enemy of it, without any impulſe but his own covetous or revengeful Mind, ſurely it cannot be unlawful for the other to receive him. *We receive a Fugitive by the Law of War*, ſaith *Celſus*, that is, it is not againſt the Law of War to admit ſuch, even a Traitor, *who having deſerted the Enemy's part, electeth ours*; however ſuch Perſons ought not to be rendered, unleſs expreſsly ſtipulated *, but ought to be pardoned. *By the Laws of* England, *if any Officer, Soldier or Mariner, in actual Service, and in the Pay in his Majeſty's Fleet, or any other Perſon in the ſame, ſhall give, hold, or entertain any Intelligence to or with any King*,

Lib. 2. *c.* 3. §. *ult. ad Leg. Corn. de Sicariis pun.*

Leg. transfug. De de acq. rerum Dom.

* As was in the Peace with *Philip*, the *Ætolians*, *Antiochus*, *Polyb. in excerpt. legat.* 11. 28. 38. *Menand. Protect. idem, non decet.*

King, Prince or State, being Enemy to, or any Perſon in Rebellion againſt his Majeſty, his Heirs and Succeſſors, without Leave or Authority from the King, Admiral, Vice-Admiral, or Officers in Chief of any Squadron, they are to ſuffer Death. Now the bare receipt of a Letter or Meſſage from an Enemy, will not make a Man ſubject to the Penalty of this Article; and therefore the ſubſequent Article explains the precedent, in which it is provided, *That if any inferior Officer, Mariner, or Soldier, ſhall receive any Letter or Meſſage from any King, Foreign Prince, State, or Potentate, being an Enemy, or on their behalf; and if ſuch Perſon doth not reveal the ſame within Twelve Hours, having opportunity ſo to do, and acquaint his Superior Commander with it, ſuch Perſon is to ſuffer Death*; ſo likewiſe, *if ſuch Superior Officer or Mariner being acquainted therewith by an Inferior Officer, Mariner, or other; or ſuch Superior Officer, Commander or Mariner, in his own Perſon, receiving a Letter or Meſſage from any ſuch Enemy or Rebel, and ſhall not in convenient time reveal the ſame to the Admiral, Vice-Admiral or Commander of the Squadron, he ſhall ſuffer the like pain of Death, or ſuch Puniſhment as a Court Martial ſhall inflict.* Now *Spies* are put to Death ſometimes juſtly by thoſe that manifeſtly have a juſt cauſe of Warring by others, by that licence which the Law of War granteth; nor ought any Perſon to be moved with this, that ſuch being taken, are puniſhed with Death; for that proceeds not from their having offended againſt the Law of Nations, but from this, that by the ſame Law every thing is lawful againſt an Enemy; And every one, as it is for his own Profit, determineth either more rigorouſly or gently: But that *Spies* are both lawful and practicable, there is no Queſtion; for at this day by the general Inſtructions of Fleets, there are always out of each Squadron ſome Frigates or Ships appointed to make diſcovery of the Enemy; and upon ſight to make Sail, and to ſtand with them, in order to take cognizance of their Force, as well Ships of War as Fire-Ships, and in what poſture they lay; which being done, *thoſe detecting Frigates are to ſpeak together, and to conclude on the Report they are to give, which done, they return to their reſpective Squadrons*; ſuch Ships in ſuch Service are not obliged to fight, eſpecially if the Enemies Force exceed them

Stat. 13. Car. 2. cap. 9. Artic. 3.

Artic. 4.

Ad Leg. Corn. de Sicariis pun.

Tacit. Hiſt. 5.

them in number, or unleſs they ſhall have an apparent Advantage.

Bartol. Leg. nullus Leg. 2. de Judæis Cælicolis.

VIII. Again, it is not lawful for any, be he Friend or Neuter, to relieve an Enemy, much leſs for a Soldier or Mariner in pay, *to ſupply him that conſpires the deſtruction of my Country, is a liberality not to be allowed of:* He is to be accounted an Enemy that ſupplies the Enemy with Neceſſaries for the War; and therefore by the Laws of War is ſo to be eſteemed; and by the Laws of *England*, *If any Perſon in the Fleet relieve an Enemy or Rebel in time of War, with Money, Victuals, Powder, Shot, Arms, Ammunition, or any other Supplies whatſoever, directly or indirectly, be ſhall ſuffer Death.*

Procopius Goth. 1.

Stat. 13. Car. 2. cap. 9. Artic. 5.

Artic. 6.

IX. *Ships being aſſaulted and taken as prize, all the Papers, Charter-Parties, Bills of Lading, Paſs-ports, and other Writings whatſoever that ſhall be taken, ſeized, or found aboard, are to be duly preſerved, and not torn or made away; but the very Originals are to be ſent up entirely and without fraud to the Court of Admiralty, or to the Commander appointed for that purpoſe, in order to the Condemnation of the Prize, upon pain of the Captors loſing their Share in the Prize, and alſo ſubject to ſuch other Puniſhment as a Court Martial ſhall think fit.*

X. The Right of taking of Spoil was approved of God, within thoſe natural Bounds which have been already mentioned, as is further evinced by the Appointment of God in his *Law* concerning the Acquiſition of Empire over the conquered, after refuſal of Peace, *All the ſpoil thereof ſhalt thou take unto thyſelf, and thou ſhall eat the ſpoil of thine Enemies, which the LORD thy GOD hath given thee.* Hence it is, that things taken from the Enemy, preſently become theirs that take them by the Law of Nations, and ſuch Acquiſition is called *Natural*, for not any cauſe, but the naked fact is conſidered; And thence a Right ariſeth; for as the Dominion of things began from Natural Poſſeſſion, and ſome print of the ſame remains in the things taken in the Land, the Sea, and the Air, ſo likewiſe of things taken in War; all which inſtantly become theirs that firſt become Captors: and from the Enemy are judged to be taken away thoſe things alſo which are taken away from the Subjects of the Enemy. But though this gives a Right to the Captors, yet that

Deut. xx. 14.

Leg. Nat. §. ult. de D. acq. rer. Dom. tit. de rerum Deo.

Quæ armis quæſita eſſent & parta belli jure non dimittenda.

muſt

muſt be underſtood to the Soveraign, or to the State that imployed them, and not to themſelves; but if they have any ſhare of the Prize, the ſame proceeds by the condeſcenſion or grant of the Soveraign, which may be enlarged or abriged as occaſion ſerves; and therefore by the Laws of *England*, *Ships of War having taken a Prize, the Goods and all manner of Lading is to be preſerved, till Adjudication ſhall paſs*; but that is to be underſtood, where the Ship voluntarily yields: but Ships whom they ſhall aſſault, and take in fight as Prize, the pillage of all manner of Goods and Merchandizes (other than Arms, Ammunition, Tackle, Furnitures or Stores of ſuch Ships) as ſhall be found by the Captors, *upon or above the Gun-Deck of the Ship, become theirs*; but this is to be underſtood where ſuch Prize may lawfully be poſſeſt; for there are times when ſuch are not to be meddled with; and therefore it is againſt the Rules of War in Fight, if ſome of the Enemies Ships are there diſabled; yet thoſe Ships that did ſo diſable them, if they are in a condition to purſue the Enemy, cannot during the Fight take, poſſeſs, or burn ſuch diſabled Ships, and the reaſon is, *leſt by ſo doing ſome more important ſervice be loſt*, but they are to wait for ſuch Booty, till the *Flag*-Officers ſhall give command for the ſame.

Artic. 7.

By the donation of his *Majeſty*.

Artic. 8.

Vluzzali, King of *Algier*, in the famous Battle of *Lepanto*, having behav'd himſelf very valiantly there againſt the *Chriſtians*, ſo that he deſtroyed ſeveral of their Gallies, and others, he took amongſt the reſt of the Gallies of *Pietro Bua* of *Corſa*, of the *Prior of Meſſina*, and *Ludovico Tipico* of *Trabu*, and *Benedeto Soranzo*, the which he towed after him before the Battle was compleated; but that getting proved the loſs both of the one and of the other; for the *Turks* out of Covetouſneſs of the Plunder, or otherwiſe thronging into them, occaſioned their taking fire, in which the *Victors*, in thoſe Flames became *Victims*, and after followed the total Rout of the *Ottoman* Power.

Hiſt. Reipubl. Venet. fol. 127, 128.

XI. It is almoſt impoſſible, but that in Ships of War, which in theſe days carry ſo conſiderable a force of men, there will be ſome amongſt them that have Heads of knavery, and Fingers of Lime-Twigs, not fearing to ſteal that from their Prince which is applicable only for the Good

Good of their Country; ſuch ſort of *Night-wolves* when caught, are to be ſeverely puniſhed; and therefore *to ſteal or take away any Cables, Anchors, Sails, or any of the Ship's Furniture, or any of the Powder or Arms, or Ammunition of the Ship, ſubjects the Offender to the pains of Death, or to ſuch other Puniſhment as the Quality of the Offence ſhall be found by a Court-Martial to deſerve.*

Artic. 8.

Artic. 9.

Cræſus perſwading *Cyrus* not to give up *Lydia* to be pillaged by his men, tells him, *Non meam, inquit, non res meas diripies, nihil enim ad me jam iſta pertinent: tua ſunt, tua illi perdent.* Herod. *lib.* 1.

* Victor *de Jure Belli, n* 49. & 60. *D. & C. de Juris & facti ignorantia.*

XII. By the Ninth Article, *Foreign Ships or Veſſels taken as Prize, without fighting, none of the Captains, Maſters, or Mariners being foreigners, ſhall be ſtripped of their Cloaths, or in any ſort beaten, pillaged, or evil intreated; the Perſons ſo offending being obliged to render double Damage:* This Law moſt expreſsly doth not extend to thoſe that obſtinately ſhall maintain a Fight; for moſt certain, by the Law of Arms, if the Ship be boarded and taken, there remains no reſtriction but that of Charity; and if a Ship ſhall perſiſt in the Engagement, even till the laſt, and then yield to mercy, there hath been ſome doubt, * whether Quarter ought to be given to ſuch (for they may ignorantly maintain with courage a bad cauſe) but in Captives and thoſe that yield or deſire to yield, there is no danger. Now that ſuch may be juſtly killed, there muſt be ſome antecedent Crime, and that ſuch a one as an equal Judge would think worthy of Death; and ſo we ſee great ſeverity ſhewed to the Captives and thoſe that have yielded, or their yielding on condition of Life not accepted, if after they were convinced of the Injuſtice of the War, they had nevertheleſs perſiſted with Hatred or Cruelty; if they had blotted their Enemies Name with unſufferable diſgraces; if they had violated their Faith or any Right of Nations, as of Ambaſſadors; if they were Fugitives: But the Law of Nature admits not Taliation, except againſt the very individual Perſon that hath offended; nor doth it ſuffice that the Enemies are by a fiction conceived to be as it were one Body; tho' otherwiſe by the Laws of Nations, and by the Laws of Arms, and at this day practiſed, in all Fights, the ſmall Frigates, Ketches, and Smacks are to obſerve and take notice of the Enemies Fire-ſhips and to watch their Motion, and to do their beſt to cut off their Boats, and generally *the perſons found in them are to be put to death, if taken, and the Veſſel, if not taken,*

Princes indeed are *Gods*, but neither do the Gods hear the prayers of ſupplicants, except they be juſt.

The *Syracuſians* were accuſed for that they ſlew the Wives and Children of *Hycetas*, becauſe *Hycetas* had ſlain the Siſter and Son of *Dion. Plutarch. Timon, & Dion.*

taken, deſtroyed; and the reaſon why the extremity of War is uſed to ſuch, is that by how much the Miſchief is the greater by the Act of ſuch Men, if executed, by ſo much the Puniſhment is aggravated, if taken, and Quarter denied them by the Law of War.

XIII. *Every Captain or Commander upon ſignal or order of Battel, or view, or ſight of any Ships of the Enemy, Pirate, or Rebel, or likelihood of Engagement, are to put all things in the Ship in fit Poſture for a Fight, as the breaking down the Cabins, clearing of the Ships of all things that may impede the Soldiers in the preſerving the Ship and themſelves, and endamaging the Enemy; and every ſuch Commander or Captain are in their own Perſons, and according to their Place, to hearten and encourage the inferior Officers and Common Men to fight valiantly and couragiouſly, and not to behave themſelves faintly, under the diſgrace of being caſhiered; and if he or they yield to the Enemy, Pirate or Rebel, or cry for quarter, he or they ſo doing, ſhall ſuffer the pains of Death, or ſuch other Puniſhment as the Offence ſhall deſerve.* Now, tho' Soldiers or Mariners have obliged themſelves faithfully to ſerve in the Expedition or Navy; yet that is to be underſtood no further than his or their power to do their utmoſt in his or their Quality; for though the Obligation for the Service be taken in the ſtricteſt Terms of undergoing death and danger; yet it is to be underſtood always conditionally as moſt Promiſes are, *viz.* if the action or paſſion may be for that Fleet or Prince's advantage; and therefore if the Fleet or Squadron is beaten and the Ships are diſabled, and left ſcarce without any to defend them, now the Soldiers or * Mariners remaining can do no more for their Prince than die, which indeed is to do nothing at all, but to ceaſe for ever from doing any thing either for him or themſelves; in thoſe ſtraits therefore it is not repugnant to their Oath, called *Sacramentum Militare*, to aſk quarter or to ſtrike, and having begg'd a new Life and taken it, they are bound in a new and juſt Obligation of Fidelity to thoſe whom they were bound to kill few hours before; neither can the Prince or General expect by virtue of their former Obligation to him, they ſhould kill any in the place where the quarter was given: However, this Fidelity hath not its inception from the time of taking quarter; but when the Battle is over, and that time which

Artic. 10.

* *Lipſius de Mil. Rom. l.* 2. *dial.* 6. & 4. And *Polybius* expreſſeth the Oath thus, *Obtemperaturus ſum, & facturus quicquid mandabitur ab Imperatoribus, juxta vires:* and ſuch, ſays he, were termed *Milites per Sacramentum.*

which is termed cold blood; for without all controverſy, if a Ship be boarded, and Quarter is given, yet if while the Fight laſts, the Perſons Captives can by any poſſibility recover their Liberty and Ship, they may by the *Law of Arms*, juſtly acquire the ſame *.

* Sir *Thomas Chichley* did ſo aboard the *Katherine* in the War with *Holland*.

And ſince Impunity is granted to ſuch unfortunate Deſerters, yet it muſt be apparently evident and fully proved, that they were reduced into a Condition beyond all hope in the Battle: and therefore the Foot that forſook the *Unfortunate Pompey* before the Field was loſt, were juſtly condemned for the breach of the *Roman* Diſcipline and Law of Arms: and therefore the Article hath not poſitively declared Death only, but added, *or ſuch other Puniſhment as the Offence ſhall deſerve*, which Proviſion leaves the Action to be judged and puniſhed by a *Council of War*, who know beſt what's to be done in Caſes of that nature; however, *a baſe or cowardly yielding, or crying quarter, is to be puniſhed with Death, and that without Mercy.*

Zenoph. Cyr. Plutarch. Quæſt. Rom. 39. & *Marcello. Vide* in Tit. Ships of War.

XIV. The obeying of Orders hath in all Ages been in mighty eſteem: *Chryſantus*, one of *Cyrus*'s Soldiers, being upon his Enemy, withdrew his Sword, hearing a Retreat ſounded; but this comes not from the external *Laws of Nations*; for as it is lawful to ſeize on the Enemy's Goods, ſo likewiſe to kill the Enemy, for by that Law the Enemies are of no account; but ſuch Obedience proceeds from the *Military Diſcipline* of ſeveral Nations. By the *Romans* it was a Law noted by *Modeſtinus*, That whoſoever obeyed not his Orders, ſhould be puniſhed with death, though the matter ſucceeded well: Now he alſo was ſuppoſed not to have obeyed, who out of Order, without the Command of the *General*, entred into any Fight. For if ſuch liberty were lawful, either Stations would be deſerted, or (licence proceeding) the Army, Fleet, or Squadron would be engaged in unadviſed Battles, which by all means is to be avoided. *M. Capello*, a *Venetian* Gentleman of an antient Extraction, having the Charge of the *guarding the Venetian Gulph* *, met with the *Barbary Fleet*, whom he ſo aſſaulted, that he burnt and took divers

Leg. deſert. D. de re Milit.

Liv. lib. 7. *Manliani Imperia.*

The Order of Battle is to be preſerved, and in all caſes they are

divers of them; amongſt the reſt the *Admiral Galley of Algier*, (a Veſſel of vaſt bigneſs) which he brought with him away, and ſhe remains at this day a *Trophy* in the *Arſenal of Venice*; the Service, although Noble and Honourable, and ſuch as brought renown to the Republick, yet in regard it was an Action exceeding his Commiſſion, he was adjudged to puniſhment (but his great Merit and Alliance preſerved his Life:) ſuch an exact Obedience that *Signory* expects to be paid to her Orders, be the Succeſs never ſo glorious. And by the Eleventh Article, *Every Captain, Commander, and other Officer, Seaman or Soldier of any Ship, Frigate, or Veſſel of War, are duly to obſerve the Commands of the Admiral, or other his Superior, or Commander of any Squadron, as well for the aſſaulting and ſetting upon any Fleet, Squadron, or Ships of the Enemy, Pirate or Rebels, or joining Battle with them, or making defence againſt them, as all other the Commands of the Admiral or other his Superior Commander*, the diſobeying of which ſubjects him to the pains of Death, or ſuch other Puniſhment as the Quality or Neglect of his Offence ſhall deſerve.

to endeavour to keep in one line as much as may be; and though they have beaten ſome of the Enemy, yet muſt they not purſue a ſmall number, before the main of the Enemy be beaten or run. Nor ought they in chaſing, chaſe beyond ſight of the Flag, and at night all chaſing Ships are to return to the Flag. *Inſtr.* 22, 23. *in May* 1. 1666.

* Hiſtory of the Republick of *Venice*, *fol.* 170, 171.

XV. Again, *Every Captain and all other Officers, Mariners and Soldiers of every Ship, Frigate, or Veſſel of War, ſhall not in time of any Fight or Engagement withdraw or keep back; but on the other hand, they are to come into the Battle, and engage, and do their utmoſt endeavour to take, fire, kill, and endamage the Enemy, Pirate or Rebel, and aſſiſt and relieve all other his Confederate Ships; and if they ſhall prove Cowards, they are to be dealt with as Cowards ought by the Law of Arms, which is to ſuffer Death:* But circumſtances of things may make alteration of Matters, therefore there is added other puniſhment, as the circumſtance of the Offence ſhall deſerve, or a *Court Martial* think fit. By the word *Captain* the *General* or *Admiral* is not included, but all *Flag-Officers* and others under them, are within the purview of the *Statute* by the denomination of the word *Captain*, &c. and the Reaſon wherefore ſuch Commanders in Chief are not within the *Law*, is, becauſe the Weapon of a *General* is his Truncheon, but of all

Artic. 12.

In milite unius ſors eſt, in Imperatore univerſorum periculum: unus homo pluris fuit quam univerſa civitas.

Clearchus Cyro dedit conſilium, ne ipſe ſe in periculum offerret ſed inſpectorem ſe pugnæ gereret; pugnantem enim corpore nil magni efficeret, ſi verò quid damni acceperit, omnes ſe perditurum quos ſecum haberet. Polyb. *Stra. lib.* 2.

† *Guicciard. l.* 3. *Aphor.* 28.

all other Officers is the Sword; a *General* is only to command, and the reſt to execute, for in the latter is the danger only of one Man's life, but in the firſt is the hazard of all; therefore by the Law of Arms no *General* or *Admiral* in Chief ought to expoſe their Perſon to apparent Peril, but in caſe of a general Overthrow and manifeſt Defeat. *Peter Capponi*, the Famous *General* for the *Florentines* beſieging *Soiana*, and encamping on the River *Caſina* †; being in a Place of danger, extreamly induſtrious about planting his Battery, was ſhot with a Harquebuſs, immediately upon which the Siege was raiſed; yet, on the other hand, let it be examined where any famous battle hath been obtained, and the ſame was not got, not only by the Conduct, but likewiſe by the ſingle and perſonal Courage of the *General*.

Cicero Offic. 1. *&* 2.

Grotius *de Jure Belli ac Pacis, l.* 1. *c.* 2. §. 1.

There are ſome Offices to be done, even to them from whom you have received an Injury; for Revenge and Puniſhment muſt have a meaſure; and therefore the Iſſues of the *Roman Wars* were either mild or neceſſary: Now when killing is juſt in a juſt War, according to internal Juſtice, may be known by examining the Cauſes or End of the War, which may be for the Conſervation of Life and Members, and the keeping and acquiring of things uſeful unto Life; now in the aſſaulting of Ships, it happens that one is ſlain on purpoſe or without purpoſe; on purpoſe can no man be ſlain juſtly, unleſs either for juſt puniſhment, as if without it we cannot protect and defend our Life, Goods, and Country, *&c.* That ſuch Puniſhment may be juſt, it is neceſſary that he who is ſlain have offended, and that ſo much as may be avenged with the puniſhment of Death in the Sentence of an equal Judge. Now we muſt note, between full Injury and mere Miſfortune often intercedes ſome mean, which is as it were compoſed of both, ſo that it can neither be called the Act of one knowing and willing, nor merely the act of one ignorant or unwilling.

Miſericordia infortuniis debetur: at qui deliberatâ ſcientiâ malè agit, non infœlix, ſed injuſtus: And *Cicero* hath a Saying out of *Demoſthenes*; We muſt ſhew compaſſion to thoſe whom For-

This Diſtinction by *Themiſtius* is fully illuſtrated: *You have made a difference betwixt an Injury, a Fault, and a Misfortune; although you neither ſtudy* Plato, *nor read* Ariſtotle, *yet you put their Doctrine in practice; for you have not thought them worthy of equal puniſhment, who from the beginning perſuaded the War, and who afterward were carried*

ried with the ſtream, and who at laſt ſubmitted to him, that now ſeemed to have the higheſt Power; the firſt you condemned, the next you chaſtiſed, the laſt you pitied. Moſt certain, to ſpare Captives or Priſoners of War, is a command of Goodneſs and Equity; and in Hiſtories they are often commended, who when too great a number prove burthenſome or dangerous, choſe rather to let them all go than to ſtay them, or detain them, though for Ranſoms; as in the laſt *Flemiſh* Wars with *England*. So for the ſame cauſes, they that ſtrike or yield up themſelves are not to be ſlain (though there is no Proviſion made by Covenant). In Towns beſieged it was obſerved by the *Romans*, before the *Ram* had ſmitten the Wall; *Cæſar* * denounceth to the *Aduatici*, he would ſave their City, if before the *Ram* had touched the Wall, they yielded; which is ſtill in uſe in weak Places, before the great Guns are fired; in ſtrong Places, before an Aſſault is made upon the Walls †; and at Sea; by firing one or two Guns, or hanging out the Bloody Flag, according as the Inſtructions are; however till there be an abſolute yielding or quarter cried, by the *Law of Arms*, as well as the abovementioned Article, every Commander and Soldier is to do his utmoſt to take, fire, kill, and endamage the Enemy, or whatſoever may tend thereunto.

tune, not their own Deeds, have made miſerable.

Scipio Æmilianus at the Overthrow of *Carthage*, proclaim'd that they ſhould fly that would. *Polybius, vide Tacitus Annal.* 12. *Vide Serran. in reb. Franc.* 1. *& Hen.* 23 *Thucyd. lib.*

**Cæſar lib* 2. *de bello Gallico.*

† *Dinant* in *Germany* being taken by Aſſault, the Town was razed and burnt, and the Priſoners all put to Death. *Phil. Comin. lib.* 2. *cap.* 1.

XVI. By the *Law of Arms*, he deſerves puniſhment who doth not keep off force that is offered to his Fellow Soldier; and though it hath been conceived, if there be manifeſt danger, that he is not bound to come into his Relief; for ſuch Commander may prefer the lives in his own Ship before thoſe in another, yet that ſuffices not; for every Soldier by the Law of Arms is not only bound to defend, but alſo to aſſiſt and relieve his Companion: now Companions are in two reſpects, either thoſe that are in actual ſervice with ſuch Soldiers, or thoſe that are not, but only committed to their Protection or Convoy, which are to be defended and guarded at the ſame peril and charge that a fellow Soldier is; and therefore all Ships that are committed to Convoy and Guard, *They are diligently and carefully to be attended upon without delay,* *according*

I will defend my Companion at the hazard of my own Blood, and partake in his danger. *Senec. de Ben.* 2. 15.

Artic. 13.

according to their Inſtructions, in that behalf: And whoſoever ſhall be faulty therein, and ſhall not faithfully perform the ſame, and defend the Ships and Goods in their Convoy, without either diverting to other parts or occaſions, or refuſing or neglecting to fight in their defence, if they be ſet upon, or aſſailed, or running away cowardly, and ſubmitting thoſe in their Convoy to Hazard and Peril, or ſhall demand or exact any Money or other Reward from any Merchant or Maſter, for convoying of any ſuch Ships or other Veſſels belonging to His Majeſty's Subjects, ſhall be condemned to make reparation of the Damage to the Merchants, Owners, or others, as the Court of Admiralty *ſhall adjudge, and alſo be puniſhed criminally according to the quality of their Offences, be it by Pains of Death or other Puniſhment, according as ſhall be adjudged fit by that Court Martial.*

Etiam hujus rei in feris imago quædam. Leo in Adulteræ pœnam conſurgit. *Plin. Hiſt. Nat.* 8. 16.

Protection of Convoys by the *Laws of Nations*, is of a great Utility to a Kingdom or State; therefore when Violence is offered to thoſe Ships under Convoy, they are not ſaid to be done to them, but to thoſe Ships of War under whoſe Guard they paſs; and therefore when Violence is offered to ſuch, publick Revenge is let in, according to that of *Tacitus*, *He ſhould provide for their Security by a juſt Revenge.* Now that ſuch Ships may not ſuffer Wrong from their Invaders, two ways may be taken by their Convoys: firſt, by deſtroying him or them that ſhall have attempted and commited any hoſtile Act againſt any thing under their Protection; ſecondly, by all ways imaginable endeavour the weakning his or their Force, that he or they may not be able to do any other or further Hurt; therefore there is no doubt but Vindication to theſe Ends is within the Bounds of Equity, though this is no more than private; yet if he reſpect the bare Law of Nature, abſtract from Laws Divine and Human, and from all not neceſſary Accidents to things, it is not unlawful, whether the Satisfaction or Revenge is taken by Convoy Ships themſelves, or the wronged ones under his or their Guard or Protection, ſeeing it is conſentaneous to Nature, that Man ſhould receive Aid from Man; and in this Senſe may be admitted that ſaying of *Cicero*, *The Law of Nature is that which comes not from Opinion, but innate Virtue:* Among the Examples of it is placed *Vindication*, which he oppoſes to Favour; and that none might

doubt

doubt how much he would have underſtood by that name, he defines Vindication, *whereby, by defending or revenging, we keep off Force and Contumely from us and ours, who ought to be dear unto us, and whereby we puniſh Offences.*

Now thoſe Ships that are not under Convoy, but engaged in Fight, are faithfully to be relieved ; and therefore if a Squadron ſhall happen to be over-charged and diſtreſſed, the next Squadron or Ships are to make towards their relief and aſſiſtance upon a Signal given them. Again, Ships that are diſabled by loſs of Maſts, ſhot under Water, or the like, ſo as they be in danger of ſinking or taking, the diſtreſſed Ships generally make a Sign by Waft of their *Jack* and *Enſigns*, and thoſe next to them are bound to their Relief : but yet this does not always hold place ; for if the diſtreſſed Ship is not in probability of ſinking, or otherways encompaſſed with the Enemy, the Reliever is not to ſtay under pretence of ſecuring them, but ought to follow his Leader and the Battle, leaving ſuch lame Ships to the Sternmoſt of the Fleet, it being an undoubted Maxim, *That nothing but beating the Body of the Enemy can effectually ſecure ſuch diſabled Ships.*

XVII. It is not enough that Men behave themſelves valiantly in the beating of an Enemy, for that is not all, but the reducing of them into a condition to render right either for Damage done, or to render that which is right ; which can't well be done without bringing him to Exigences and Straits ; and therefore if the Enemy, Pirate, or Rebel be beaten, *None, through Cowardice, Negligence, or Diſaffection, ought to forbear the purſuit, and thoſe of them flying ; nor ought ſuch either through Cowardice, Negligence, or Diſaffection, forbear the aſſiſtance of a known Friend in view, to their utmoſt Power,* the Breach of which ſubjects the Offenders to the Pains of Death, or at leaſt ſuch Puniſhment as a *Court Martial* ſhall think fit. *Artic.* 14. But that is to be underſtood as in the 12 §. of this Chapter.

Empires are got by Arms, and propagated by Victory ; and by the *Laws of War*, they that have overcome, ſhould govern thoſe they have ſubdued. Hence it is, that Generals having compleated a Conqueſt in a juſt War, and in chaſe or otherwiſe have taken the Ships or Goods of the Enemy, have abſolute Power over the Lives, Eſtates, Ships and things that they by Force of Arms have acquired by the *Laws of Nations.*

But yet in ſuch Conqueſts where the reeking Sword knows no Law, that is, they are done *impunè*, without Puniſhment, (becauſe co-active Judges do grant them their Authority) yet ſuch Power may be exorbitant from that Rule of Right called *Virtue*; and though by the *Law of War* Captives may be ſlain, yet what Law forbids not, Modeſty prohibits to be done, Hence it is that *Generals* do often reſtrain that Power of killing; for though ſuch Priſoners of War do fight for the Maintenance of an unjuſt Cauſe, and although the War is begun by a ſolemn Manner; yet all Acts that have their riſe from thence, are unjuſt by internal Injuſtice, ſo that they who knowingly do perſiſt in fighting, * yet ought they not always to be ſlain, according to that of *Seneca*; *Cruel are they*, ſays he, † *that have Cauſe of Puniſhment, but have no meaſure.* For he that in puniſhing goes further than is meet, is the ſecond Author of Injury; and the principal Reaſon why Mercy is often ſhewed, is for that Soldiers of Fortune offend not out of any Hatred or Cruelty, but out of Duty.

Tacit. 3. *Annal. Pompeius gravior remediis quam delicta erant.*

* *Grot. de Jure Belli ac Pacis, l.* 3. *c.* 10. §.
† 2. *de Clem. cap.* 4.

XVIII. Again, *Generals* in the Meaſure of killing, look commonly no further than the Deſtruction of thoſe who by F[illegible]ce of Arms oppoſe them; and though Ships or Cities are taken by Aſſault, the which by the Laws of War ſubjects every individual to the Mercy of the Conqueror, yet Children, Women, old Men, Prieſts, Scholars, and Huſbandmen are to be ſpared; the firſt by the Law of Nature, according to that of *Camillus*: *We have Arms*, ſays he, *not againſt that Age which even in taking Cities is ſpared, but againſt armed Man*: and this is the Law of Arms amongſt good Men; by which we are to note, that by the Words *good Men*, as is obſerved, we mean the Law of Nature, for ſtrictly by the Law of Arms, the Slayers of them are without Puniſhment.

In Vita Camilli. Liv. lib. 1, & 5.

Grotius, lib. 3. *cap.* 11. who obſerves, that many Pretences may be found out againſt Men of mature Age, but againſt Infants, Calumny itſelf can find nothing to ſay, as being clearly Innocents.

Now that which hath always place in Children that have not attained the uſe of Reaſon, for the moſt part prevails with Women; that is, unleſs they have committed

ted ſomething peculiarly to be avenged, or do uſurp manly Offices, as flinging of Stones from the Walls, pouring down burning Pitch, Brimſtone, and the like bituminous Stuff, firing of Guns, and the like; for it is a Sex that hath nothing to do with the Sword, that are capable of that Clemency. *Herod. in Vita Maximin. fol.* 417.

The like for Old Men, who, *Papinius* obſerves, are not to be ſlain; ſo for Miniſters of ſacred things, even barbarous Nations have had them in Reverence and Preſervation; as the *Philiſtines*, Enemies of the *Jews*, did to the *College of Prophets*, to whom they did no Harm: and with thoſe Prieſts are juſtly equalled in this Reſpect, they that have choſen a like kind of Life, as *Monks* and *Penitents*, whom therefore as well as Prieſts, the *Canons* following in natural Equity will have ſpared: to theſe are deſervedly added thoſe that give themſelves to the ſtudy of good Learning and Sciences uſeful to Mankind, be it in *Univerſities*, or other publick *Schools* or *Colleges*. But yet if any of theſe be taken in actual Service, they then may receive the common Fate of others. So our King *Richard* the Firſt, having taken the Martial Biſhop of *Beauvais* Priſoner, received a Letter from the *Pope*, that he ſhould no longer detain in Cuſtody his dear Son; the King ſent the *Pope* back the Armour wherein he was taken, with the Words of *Jacob's* Sons to their Father, *See whether or no this be the Coat of thy Son.* *Papin. nullis violabilis armis Turba ſenes. Vict. D. loco.* 1 Sam. x. 5, and 1 Sam. xix. 18. *Coke's 2d Inſtit.* 58.

To theſe are added Tradeſmen, ſo likewiſe Merchants, which is not only to be underſtood of them that ſtay for a time in the Enemy's Quarters, but of perpetual Subjects; for their Life hath nothing to do with Arms, and under that Name are alſo contained other Workmen and Artificers, whoſe Gain loves not War but Peace. *Leg. execut. C. quæ res pign. Vide 2 Inſtit. fol.* 58. & *Trin.* 21 *E.* 1. *Rot.* 127.

Again, Captives, and thoſe that yield, are not to be ſlain, for to ſpare ſuch *is a Command of Goodneſs and Equity*, ſays *Seneca*; however it may ſo come to paſs, that though the military Power may exempt a Priſoner of War from the Execution of the Sword, yet it may be out of their Power to exempt or diſcharge a Delinquent or Traitor from the Execution of the Magiſtrate, as if the Fleet were prepared, and the War principally begun for the Suppreſſion of ſuch; and the Reaſon of this is, if it ſhould be in the Power of one Soldier, who takes a Trai- *De Beneſic.* 5. *cap.* 18.

tor Priſoner upon ſuch Terms, it would *pari ratione* be in the Power of all to pardon; not that the Article hath no effect, for the Traitor is by that freed from the immediate Execution of the Sword: Sure it is, that if the yielding be in *aperto prælio*, methinks abſolute Pardon is implicitly in the Contract: however this is undeniable, that having yielded himſelf Priſoner of War, if he eſcape, he forever loſes the Benefit of the Promiſe. Nor are Hoſtages to be deſtroyed, according to that of *Scipio*, who ſaid: *He would not ſhew his Diſpleaſure on harmleſs Hoſtages, but upon thoſe that had revolted; and that he would not take Revenge of the unarmed, but of the armed Enemy.* 'Tis very true by the Law of Arms, if the Contract be broke for which they became Hoſtages, they may be ſlain, that is, the Slayer is without Puniſhment: But yet ſome conceive the Slayer is not without Sin, for that no ſuch Contract can take away any Man's Life; that is, I ſuppoſe, an Innocent's Life; but without Controverſy, if thoſe that become Hoſtages be, or were before, in the number of grievous Delinquents, or if afterwards he hath broken his Faith given by him in a great Matter, the Puniſhment of ſuch may be free from Injury.

Libertinum ingratum in priſtinam redigit ſervitutem. Forteſcue, *cap.* 46.

Liv. lib. 28. The ſame ſaith *Julian* in *Nicetas.*

Grot. lib. 3. *cap.* 11.

XIX. Where Offences are of that nature as they may ſeem worthy of Death, as Mutiny, and the like, *&c.* it will be a Point of Mercy, becauſe of the multitude of them, to remit extreme Right, according to that of *Seneca*: *The Severity of a General ſhews itſelf againſt Particulars, but Pardon is neceſſary when the whole Army is revolting: What takes away Anger from a wiſe Man? the multitude of Tranſgreſſors.* Hence it was, that caſting of * Lots was introduced that too many might not be ſubjected to puniſhment.

2 *de Ira cap.* 10. *Quicquid multis peccatur inultum eſt. Magis monendo quam minando, ſic enim agendum eſt cum multitudine peccantium, ſeveritas autem exercenda eſt in peccata paucorum. Vide* Gailium de Pace publ. *lib.* 11. *cap.* 9, 36.

* *Vide Grot. lib.* 3. *cap.* 11. §. 17.

However all Nations have generally made it a ſtanding Rule in the Puniſhment of Mutineers, as near as poſſible, to hunt out the Authors, and make them Examples †.

† *Victor. de Jure Belli, n.* 55. *lib.* 2.

And

And therefore by the 15th Article. *If any Man at* Artic. 15. *any time, when Service or Action is commanded, ſhall preſume to ſtop, or put backwards or diſcourage, the ſaid Service and Action, by pretence of arrears of Wages, or upon any pretence of Wages whatſoever, they are to ſuffer Death*; and indeed the ſame ought to be without Mercy, by how much the more they may raiſe a Mutiny at a time when there is nothing expected but an Action, and the ſhewing the moſt obſequious Duty that poſſibly may be; the Breach of which may occaſion the Damage of the whole Fleet, and being of ſuch Dangerous Conſequence, ought to be ſeverely puniſhed. *Guſtavus Adolphus* upon his firſt entrance into *Germany*, perceiving how that many Women followed his Soldiers, ſome being their Wives, and ſome wanting nothing to make them ſo but Marriage, yet moſt paſſing for their Landreſſes (though commonly defiling more than they waſh) the King coming to a great River, after his Men and the Waggons were paſſed over, cauſed the Bridge to be broken down, hoping ſo to be rid of theſe feminine Impediments; but they on a ſudden lift up a panick Shriek which pierced the Skies, and the Soldiers Hearts on the other ſide of the River, who inſtantly fell into Mutiny, vowing not to ſtir a Foot further except with Baggage, and that the Women might be fetched over, which was done accordingly; for the King finding this ill Humour ſo generally diſperſed in his Men, that it was dangerous to purge it all at once, ſmiled out his Anger for the preſent, and permitted what he could not amend. So likewiſe *the* Artic. 19. *uttering any Words of Sedition or Mutiny, or the endeavouring to make any mutinous Aſſemblies upon any Pretence whatſoever, is made Death*: And the very *Concealers of* Artic. 34. *any traiterous and mutinous Practices, Deſigns, or Words, or any Words ſpoken by any to the Prejudice of His Majeſty or Government, or any Words, Practices, or Deſigns tending to the Hindrance of the Service, and ſhall not reveal them, ſubject them to ſuch Pains and Puniſhments as a Court Martial ſhall think fit.* And whereas in any of the Offences committed againſt any of the Articles for the Government of any of *His Majeſty*'s Ships of War, within the narrow Seas, whein the Pains of Death are to be inflicted, Execution of ſuch Sentence ought not to be made

Artic. 20. made without leave of the *Lord Admiral*; *this of Mutiny is totally* excepted, for ſuch may be executed immediately.

XX. It is not lawful for Princes or States to make of their Enemies Traitors, or cauſe them to deſert the Service of their Prince, or to bring over their Ships, Ordinance, Proviſions, or Arms; for as 'tis not lawful for any Subject to do the ſame, ſo neither to tempt him; for he that gives a Cauſe of ſinning to another, ſins alſo himſelf; but if a Man will voluntarily, without any other Impulſe than his own, bring over the Ships or Armies, or deſert the Service of his Prince to ſerve another, this, though a Fault in the Deſerter, is not in the Receiver: *We receive a Fugitive by the Law of War*, (ſaith * Celſus) *that is, it is not againſt the Law of War to admit him, who having deſerted his Prince's part, elected his Enemy's*; nor are ſuch to be rendered, except it ſhall be agreed, as in the Peace of † *Lewis* the Eleventh. However ſuch ſort of Gameſters, if caught, are to be ſeverely puniſhed; and therefore it is provided, *That if any Sea-Captain, Officer, or Seaman, ſhall betray his Truſt, or turn to the Enemy, Pirate, or Rebel, or run away with their Ship or Ordinance, Ammunition, or Proviſion, to the weakening of the Service, or yield the ſame up to the Enemy, Pirate or Rebel, they ſhall be puniſhed with Death*; ſo likewiſe, *If any deſert the Service or the Employment which they are in on Ship-board, or ſhall run away or entice any other ſo to do, they are ſubject to the like pain of Death.* And by the Law of Nations, ſuch Deſerters that run away from their Colours or Fleet before Peace proclaimed and concluded, all Perſons of that Prince from whom they fled, have a Right indulged to them to execute publick Revenge.

Grotius, l. 3. *c.* 1. §.

* *Leg. Tranſfug. de acqu. rerum dom. Polyb. in excerp. Legat.* 9. 28. 34. *Menander Protector idem nos docet.*

† *Phil. Comin. lib.* 4. *cap.* 12.

Artic. 16.

Artic. 17.

Tertul. Apol. 9. *c. quando liceat, l.* 2. *in reos majeſtatis & publicos hoſtes omnis homo miles. Vide Grot. lib.* 1. *cap.* 5. *Hetly Rep.* 235. 7 *H.* 7. *cap.* 1. 3 *H.* 8. *cap.* 5. *Hutt.* 134.

Liv. l. 2. *c.* 3. §. *ult. ad Leg. Corn. de Sicar. pun.*

XXI. By the Laws of Nations, *Spies* may be ſent to view and ſurvey the Enemy's Force, Fleet, Station, and make diſcovery of whatſoever may give Advantage to the Perſons ſending, as is mentioned above; but being deprehended they are put to Death; and therefore *if any Perſon ſhall come from or be found in the nature of*

Artic. 18.

Spies,

pies, to bring any ſeducing Letters or Meſſages from any Enemy or Rebel, or ſhall attempt or endeavour to corrupt any Captain, Officer, Mariner, or other of the Navy or Fleet, to betray his or their Truſt, or yield up any Ship or Ammunition, or turn to the Enemy or Rebel, he ſhall be puniſhed with Death.

XXII. Soldiers and Mariners owe all Reſpect and Duty to their Superior Officers; and therefore when they are in Anger, they ought to avoid them: But above all not to quarrel with, or give them any provoking Language: And therefore by the Law of Arms, a Soldier who hath reſiſted his Captain, willing to chaſtiſe him, if he hath laid hold on his Rod, is caſhier'd, if he purpoſely break it, or laid violent Hands upon his Captain, he dies: * And by the Laws of *England*, if any Perſon ſhall preſume to quarrel with his ſuperior Officer he ſhall ſuffer ſevere Puniſhment; and if he ſtrikes him, he ſhall ſuffer Death, or otherwiſe as a *Court Martial* ſhall adjudge the Matter to deſerve †.

* *Leg. milit. D. de re milit. Refus Leg. militar. cap.* 15.

† *Artic.* 21.

XXIII. And though Mariners and Soldiers may have juſt Cauſe of Complaint, as that their Victuals or Proviſions are not good, yet muſt they not mutiny or rebel, whereby to diſtract or confound the whole Crew, but muſt make a civil and humble Addreſs to their Commander, that the ſame may be amended; and if the Caſe be ſuch, that the Commander cannot redreſs the ſame, by going to Port to ſupply the Exigencies, without Detriment of the Fleet, (as if ready to engage, or the like) they muſt, like Men and Soldiers, bear with the Extremity, conſidering that 'tis better that ſome Men ſhould periſh, nay the whole Crew in one Ship, than the whole Fleet; nay, perhaps the whole Kingdom be deſtroyed: And therefore *if any in the Fleet find Cauſe of Complaint of the Unwholſomeneſs of his Victuals, or upon other juſt ground, he ſhall quietly make the ſame known to his Superior or Captain, or Commander in Chief, as the Occaſion may deſerve, that ſuch preſent Remedy may be had, as the matter may require; and the ſaid Superior or Commander is to cauſe the ſame to be preſently remedied accordingly*; but no Perſon upon any ſuch or other Pretence, ſhall privately attempt to ſtir up any Diſturbance, upon pain of ſuch ſevere Puniſhment as a *Court Martial* ſhall think fit to inflict.

Bacon's Maxim, *fol.* 17. *Privilegium non valet contra rempublicam.*

Artic. 22.

XXIV. And

XXIV. And as the Law doth provide that there be
Artic. 24. *no waſte or ſpoil of the King's Proviſion, or imbezzlement of the ſame; ſo likewiſe that care be taken, the Ships of War neither through Negligence or Wilfulneſs be ſtranded, ſplit or hazarded, upon ſevere Penalties.* In Fights, and when great Fleets are out, there are generally Inſtructions appointed for all *Maſters*, *Pilots*, *Ketches*, *Hoyes*, and *Smacks*, who are to attend the Fleet, and to give them notice of the Roads, Coaſts, Sands, Rocks, and the like; and they have particular Stations allotted them, and Orders given, that if they ſhall find leſs Water than ſuch a proportion, they then give a Signal as they are directed to give, and continue their Signal till they are anſwered from the Capital Ships.

But in time of Fight they generally lay away their head from the Fleet, and keep their lead; and if they meet with ſuch a Proportion of Water as is within their Directions, they are to give ſuch Signal as they receive Orders for, and ſtand off from the danger; *but the wilful burning of any Ship or Magazine-ſtore of Powder, Ship-boat, Ketch, Hoy, or Veſſel, or Tackle, or Furniture thereto belonging, not appertaining to an Enemy or Rebel, ſhall be puniſhed with Death.*

XXV. There are other faults often committed by the Crew, the which the Law does puniſh, as a *quarrelling*
Artic. 23. *on Ship-board; uſing provoking ſpeeches tending to make*
Artic. 28. *quarrel or diſturbance; Murthers; wilful killing of any*
Artic. 29. *Man; Robbery; Theft; and the unnatural Sin of Sodomy and Buggery, committed with Man or Beaſt:* all which, and all other Faults and Miſdemeanors are puniſhed with Death, or according to the Laws and Cuſtoms in ſuch
Artic. 33. caſes uſed at Sea; and when any Perſons have committed any of the Offences particularly mentioned in the *Statute* of 13 *Car.* 2. *Cap.* 9. and contained in the Articles, or any others, and for the which they ſhall be committed,
Artic. 31. *the Provoſt Martial is to take them into cuſtody, and not ſuffer them to eſcape*, and all Officers and Seamen are to be aiding and aſſiſting to Officers for the detecting and apprehending of Offenders.

Touching the Puniſhments that the *Roman Generals* uſed to their Soldiers, when they were at a *Court Martial* found faulty, they were commonly proportioned according

ng to the Offence committed: Sometimes they were eaſy, of which ſort were thoſe which only branded the Soldier with diſgrace; others were thoſe that came heavy on the Perſon or Body. To the firſt belonged a ſhameful diſcharging or caſhiering a Mariner or Soldier from the Army, and generally looked on as a matter of great diſgrace, which puniſhment remains at this day for offences as well in *England*, as in moſt parts. A ſecond was by ſtopping of their Pay; ſuch Soldiers which ſuffered this kind of mulct, were ſaid to be *Ære diruti*, for that *Æs illud diruebatur in fiſcum, non in Militis ſacculum*; the which is and may at this day be inflicted, eſpecially on ſuch as ſhall wilfully ſpoil their Arms, and for the like ſort of offences. A third was a Sentence enjoined on a Soldier to reſign up his Spear; for as thoſe which had atchieved any Noble Act, were for their greater Honour *Haſta pura donati*, ſo others for their greater diſgrace were inforced to reſign up that Military Weapon of Honour. A fourth ſort of puniſhment was, that the whole *Cohort*, which had loſt their *Banners* or *Standards*, either in the Fields or at Sea, were inforced to eat nothing but Barley-bread, being deprived of their allowance in Wheat, and every *Centurion* in that *Cohort* had his Soldier's Belt or Girdle taken from him, which was no leſs diſgrace among them than the degrading (among us) one of the *Order of the Garter*: for petty Faults they generally made them ſtand bare-footed before the *General's Pavilion*, with long Poles of Ten Foot in length in their Hands, and ſometimes in the ſight of the other Soldiers to walk up and down with Turff, on their Necks, and ſometimes carrying a Beam like a Fork upon their Shoulders round the Town. The laſt of their Puniſhments was, the opening of a Vein or letting them Blood in one of their Arms, which generally was inflicted on them who were too hot and bold.

Ignominioſa dimiſſio.

Fraudat ſtipendii. Roſin. Ant. Rom. l. 10. *c.* 25.

Cenſio Haſtaria.

Goodwin Antiq. Rom. fol. 127.

The great Judgments were, to be beaten with Rods, which was generally inflicted on thoſe who had not diſcharged their Office, in the ſending about that *Table* called *Teſſera*, wherein the Watch-word was written, or thoſe who had ſtoln any thing from the Camp, or that had forſaken to keep Watch, or thoſe that had born any falſe Witneſs againſt their Fellows, or had abuſed their Bodies

Bodies by Women, or thoſe that had been puniſhed thrice for the ſame Fault, ſometimes they were ſold for Bondſlaves, beheaded and hanged. But the laſt, which was in their Mutinies, the puniſhment fell either to Lots, as the Tenth, Twentieth, and ſometimes the Hundredth Man, who were puniſhed with Cudgelling; and with theſe Puniſhments thoſe in *England* have a very near affinity, as cleanſing the Ship, loſing Pay, ducking in the Water, beaten at the Capſon's-head, hoiſted up the main Yard end with a Shovel at their Back, hanged, and ſhot to Death, and the like.

Lipſ. de milit. Rom. lib. 5. *Dialog.* 18.

XXVI. The *Admiral* may grant Commiſſions to inferior *Vice-Admirals* or *Commanders in Chief* of any Squadron of Ships, to aſſemble *Court Martials*, conſiſting of *Commanders* and *Captains*, for the Trial and Execution of any of the Offences or Miſdemeanors which ſhall be committed at Sea; but if one be attainted before them, the ſame works no corruption of Blood or forfeiture of Lands; nor can they try any Perſon that is not in actual Service and Pay in *His Majeſty's* Fleet and Ships of War. But in no caſe where there is Sentence of Death can the Execution of the ſame be without leave of the *Lord Admiral*, if the ſame be committed within the narrow Seas: Yet this does not extend to Mutiny, for there in that caſe the Party may be executed preſently.

37 *H.* 6. *fol.* 4, 5.

13 *Car.* 2. *cap.* 9.

All Offences committed in any Voyage beyond the narrow Seas where Sentence of Death ſhall be given upon any of the aforeſaid Offences, Execution cannot be awarded nor done, but by the Order of the Commander in Chief of that Fleet or Squadron, wherein Sentence of Death was paſſed.

XXVII. The Judge-Advocate hath Power given by the words of the *Statute*, to adminiſter an Oath in order to the Examination or Trial of any of the Offences mentioned in the *Statute* of 13 *Car.* 2. *Cap.* 9. and in his abſence the *Court Martial* hath power to appoint any other Perſon to adminiſter an Oath to the ſame purpoſe. This *Statute* enlarges not the Power and Juriſdiction of the *Admiral*, any further than only to the abovementioned Offences, in any caſe whatſoever, but leaves his Authority as it was before the making of this *Statute*. Nor does it give the *Admiral* any other or further Power to enquire

and puniſh any of the above-mentioned Offences, unleſs the ſame be done upon the main Sea, or in Ships or Veſſels being and hovering in the main Stream of great Rivers only beneath the Bridges of the ſame Rivers nigh to the Seas, within the Juriſdiction of the *Admiralty*, and in no other place whatſoever. 15 *R*. 2. *cap*. 3.

XXVIII. As Soldiers and Mariners for the Honour and Safety of the Realm, do daily expoſe their lives and limbs, ſo the Realm hath likewiſe provided for them, in caſe they ſurvive and ſhould prove diſabled or unfit for Service, a reaſonable and comfortable maintenance to keep them; the which the Juſtices of the Peace have power yearly in their *Eaſter Seſſions* to raiſe by way of a Tax, for a weekly relief of maimed Soldiers and Mariners. *Stat*. 43. *Eliz*. *cap*. 3. & *Vide* 13, 14. *C*. 2. *c*. 9. 7, 8 *W*. 3. *c*. 21. 2, 3. *A*. *c*. 6. whereby Proviſion is made for the Widows and Orphans.

The maimed Soldier or Mariner muſt repair to the *Treaſurer* of the County where he was preſſed, if he be able to travel; if he be not, then to the *Treaſurer* of the County where he was born, or where he laſt dwelt by the ſpace of Three Years; but if he prove unable to travel, then to the *Treaſurer* of the County where he lands.

He muſt have a Certificate under the chief Commander, or of his Captain, containing the Particulars of his Hurt and Services.

The Allowance to one not having been an Officer, is not to exceed Ten Pounds *per Annum*;

Under a Lieutenant —— 15 }
A Lieutenant —— —— 20 }

Till the Mariner arrives at his proper *Treaſurer*, they are to be relieved from *Treaſurer* to *Treaſurer*, and when they are provided for, if any of them ſhall go a begging or counterfeit Certificates, they ſhall ſuffer as common Rogues; and loſe their Penſions: Over and above this Proviſion, *His Sacred Majeſty* hath provided a further Supplement for his maimed Mariners and Soldiers diſabled in the Service, which is iſſued out at the *Cheſt* at *Chatham*, and conſtantly and duly paid them; and for his Commanders, Officers, and others that ſerved abroad, he, of his Royal Bounty, hath given to thoſe that bear the Character of War, and purchaſe the ſame by their Fidelity and Valour, a pious Bounty called *Smart-Money*, over

over and above their Pay; and laid the Foundatio an *Hoſpital* at *Chelſea*, in his Life-time, which his Sacred Majeſty hath compleated, and endowed, both Beauty and Magnificence, excelling all in *Chriſtendom*.

Nor muſt we forget that noble Hoſpital at *Gr wich*, which for a further Encouragement for Marin maimed or worn out with Age or any other Infirmity the Sea Service, our late moſt glorious Deliverer K *William* the Third, was graciouſly pleaſed to give Royal Bounty a ſtately Palace at *Greenwich* for an H pital, which is ſince ſo enlarged as to receive a thouſ Seamen; and when compleat will be able to receive hundred more; which for Statelineſs and Grandeur may venture to ſay, will exceed any thing of its Kind *Chriſtendom* can produce.

And it muſt not be omitted a very laudable Und taking is very lately ſet on Foot, it being a generous voluntary Subſcription by all the Officers of the Na allowing Three-pence in the Pound to be deducted of their Wages for the Maintenance of the Widows Orphans of ſuch Commiſſion and Warrant-Officers, w died ſince the 30th of *Auguſt* 1732, from which time commences; which his preſent Majeſty King *George* I was graciouſly pleaſed to encourage by the granting h Royal Commiſſion, bearing Date the 30th of *Auguſt* 173 by which a comfortable Maintenance is ſecured by th following Allowance.

Widow of the	*Captain*	45 *l. per Annum.*
	Lieutenant, *Maſter*	30
	All other Warrant Officers	20

The greateſt aſſurance of a Fleet is in the prudent Go vernment of the *Admiral*; the greateſt weakning of it i by diſcontent, which generally proceeds from two things want of good Victuals at Sea, and Pay when come home theſe are the poor Mariners *Aqua vitæ*; but want of them is ſuch an *Aqua fortis* as eats through all manner of Duty and Obedience: That Prince that expects to be wel ſerved and obeyed, (eſpecially by an *Engliſhman*) muſ take care that he ſuffer not a greater Power in his Flee

thar

than his own; this Commander is Neceſſity, which breaks Diſcipline at Sea, and creates Diſcouragement at Land.

XXIX. The Wiſdom of the *Romans* was mightily to be commended, in giving of *Triumphs* to their *Generals* after their Return, of which they had various ſorts; but the greateſt was when the *General* rid in his Chariot, adorned and crowned with the Victorious Laurel, the *Senators* with the beſt of the *Romans* meeting him, his Soldiers (eſpecially thoſe who by their Valour had purchaſed Coronets, Chains, and other Enſigns of reward for their Conduct and Courage) following him: But what alas! could theſe to the more ſober repreſent any other but horror, ſince the Centers from whence the Lines were drawn, could afford nothing but Death, Slaughter and Deſolation on thoſe who had the Souls and Faces of Men; and if it were poſſible, that the Blood which by their Commiſſions was drawn from the ſides of Mankind, and for which they made thoſe Triumphs, could have been brought to *Rome*, the ſame was capable of making of a Source great as their *Tiber*; but *Policy* had need of all its Stratagems to confound the Judgment of a Soldier by exceſſive Praiſes, Recompences and Triumphs, that ſo the Opinion of Wounds and wooden Legs might raiſe in him a greater Eſteem of himſelf, than if he had an entire Body. To allure others, ſomething alſo muſt be found out handſomly to cover wounds and affrightments of Death; and without this *Cæſar* in his Triumph, with all his Garlands and Muſick, would look but like a Victim; but what ſorrow of Heart is it to ſee paſſionate Man, a Ray of Divinity, and the Joy of Angels, ſcourged thus with his own Scorpions? The cholerickneſs of War (whereby the luſtful heat of ſo many Hearts is reduced) ſtirs up the Lees of *Kingdoms* and *States*, as a Tempeſt doth weeds and ſlimy ſediment from the bottom to the top of the Sea, which afterwards driven to the Shore, together with its foam, there covers Pearls and precious Stones: and though the Cannon ſhould ſeem mad by its continual firing, and the Sword reeking hot by its daily ſlaughters, yet no good man doubts but they, even they, ſhall weather out thoſe Storms, and in the midſt of thoſe mercileſs In-

Vide Salmuth. in Pancir. Leg. rerum depræd. Ca. de Triumph. Dion Halicarnaſ. lib. 5.

ſtruments find an *inculpata Tutela*, who love Juſtice, exerciſe Charity, and put their Truſt in the *Great Governor of all things*.

CHAP. XIV.

Of Salutations by Ships of War, and Merchant Men.

I. *Of Salutations paid in all Ages as an undoubted Mark of Soveraignty of this Empire.*
II. *Of thoſe Seas where this Right is to be paid to the King of* England*'s Flag.*
III. *In what manner the King of* England *holds this Right, and by whom to be paid.*
IV. *Of thoſe that ſhall neglect or refuſe to do the ſame, how puniſhed and dealt withal.*
V. *Where His Majeſty of* Great Britain*'s Ships are to ſtrike their Flag, and where not.*
VI. *Of the ſaluting of Ports, Caſtles, Forts, how the ſame is to be done, and on what Terms.*
VII. *Of Ships of War their ſaluting their Admiral and Commanders in Chief.*
VIII. *Of Ambaſſadors, Dukes, Noblemen, and other Perſons of Quality, how to be ſaluted coming Aboard and landing.*
IX. *The Admiral of any Foreign Nation, if met withal, how to be ſaluted and anſwered.*
X. *Of the Men of War or Ships of Trade of any Foreign Nations, ſaluting His Majeſty's Ships of War, how to be anſwered.*
XI. *Of the ſaluting of His Majeſty's own Forts and Caſtles, and when the Salute ceaſes.*
XII. *Of the Objection that ſeems to be made againſt the Neceſſity of ſuch Salutations.*
XIII. *Why Kingdoms and States attribute the Effects, not the cauſe of Rights, to preſcription.*
XIV. *That Kingdoms and Republicks ought not to be diſordered for the Defect of Right, in preſumption, and the objection in the XII. §. anſwered.*
XV. *The Inconveniency of War, and the cauſes juſtifying the ſame.*
XVI. *Of the cauſes not juſtifiable in War.*
XVII. *Of Moderation, and the utility of Faith and Peace.*

I. IT is evident by what hath been ſaid, that the *Britiſh Seas*, before the *Roman Conqueſt*, ever belonged to the *Iſle of Great Britain*, they always claiming and enjoying the ſole Dominion and Soveraignty of the ſame, which afterwards accrued to the *Romans* by Conqueſt, and from them tranſlated with its *Empire* to the ſucceeding *Saxon*, *Daniſh*, and *Norman* Kings; and in the Reigns of thoſe Princes there were always ſome marks of Soveraignty

raigncy paid, wherein the right of the ſame was evinced and acknowledged.

II. Now thoſe Seas in which this Salutation or Duty of the Flag are to be paid, are the four circumjacent Seas, in which all Veſſels whatſoever are to pay that Duty, according to the Cuſtom of the ſame, and the Ordinance of King *John*. How far this Right is payable, appears in the Fourth Article in the Peace between *His Majeſty* and the *States-General of the United Provinces*, in theſe words:

——— *That whatever Ships or Veſſels belonging to the ſaid United Provinces, whether Veſſels of War or other, whether ſingle or in Fleets, ſhall meet in any of the Seas from* Cape Finiſterre *to the middle point of the Land* Van Staten in Norway, *with any Ships or Veſſels belonging to His Majeſty of* Great Britain, *whether thoſe Ships be ſingle or in great number, if they carry His Majeſty of* Great Britain's *Flag or Jack, the aforeſaid* Dutch *Veſſels or Ships ſhall ſtrike their Flag and lower their Top-ſail, in the ſame manner, and with as much reſpect as hath at any time, or in any place, been formerly practiſed, towards any Ships of His Majeſty of* Great Britain, *or his Predeceſſors, by any Ships of the* States-General, *or their Predeceſſors.*

III. Now His Majeſty holds not this *Salutation* or Reſpect, by virtue of the League of the Article, but as the ſame is a RIGHT inherent to the *Empire of Great Britain*; and therefore in the firſt part of the Article it is declared in theſe Words:

—— *That the aforeſaid* States-General *of the United Provinces, in due acknowledgment on their part of the King of* Great Britain's *RIGHT to have his Flag reſpected in the Seas hereafter mentioned, ſhall and do declare, and agree.* ——

Now this Right extends and ſubjects all Nations whatſoever that ſhall paſs through thoſe Seas, and between thoſe Places meeting with any of His Majeſty's Ships of War, bearing his Flag, Jack, or Cognizance of Service, to ſtrike their Top-ſail, and take in their Flag in acknowledgment of His *Majeſty*'s Soveraignty in thoſe Seas; and if any ſhall refuſe to do it, or offer to reſiſt, they may be compelled *vi, & manu forti*, for His *Majeſty*'s Honour is by no means to receive the leaſt Diminution.

Selden Mare Clauſum lib. 2. *cap.* 23.

IV. If therefore any of His *Majeſty*'s Subjects ſhould be ſo negligent or forgetful to pay that Obedience, when it may be done without loſs of the Voyage, they are to be ſeized on, and brought to the Flag, to anſwer the Contempt, or elſe the *Commander* may remit the Name of the Ship, *Commander* or *Maſter*, as alſo the Place from whence, and the Port to which ſhe ſhall be bound, to the *Admiral*; however, before ſhe is diſmiſſed, ſhe muſt pay the Charge of the *Shot* that her Negligence or Forgetfulneſs occaſioned, and afterwards may be indicted for the ſame, and ſeverely puniſhed.

V. In His Majeſty's Seas, none of his Ships of War are to ſtrike to any; and in no other Part is any Ship of His Majeſty to ſtrike her Flag or Top-ſail to any Foreigner, unleſs ſuch Foreign Ship ſhall have firſt ſtruck, or at the ſame time have ſtruck her Flag or Top-ſail to His Majeſty's Ships.

VI. But if any of the King of *England*'s Ships of War ſhall enter into the Harbour of any Foreign Prince or State, or into the Road within ſhot of Cannon of ſome Fort or Caſtle, yet ſuch Reſpect muſt be paid, as is uſually there expected, and then the *Commander* is to ſend aſhore to inform himſelf what return they will make to his Salute; and that if he hath received good Aſſurance, that His Majeſty's Ships ſhall be anſwered Gun for Gun, the Port is to be ſaluted, as is uſual; but without aſſurance of being anſwered by an equal number of Guns, the Port is not to be ſaluted: And yet in that very reſpect before the Port is to be ſaluted, the Captain ought to inform himſelf, how Flags (of the ſame quality with that he carries) of other Princes have been ſaluted there, the which is peremptorily to be inſiſted on, to be ſaluted with as great Reſpect and Advantage as any Flag (of the ſame quality with the Captains) of any other Prince hath been ſaluted in that place.

VII. A Captain of a Ship of a ſecond Rate, being neither Admiral, Vice-Admiral, nor Rear-Admiral, at his firſt coming and ſaluting his Admiral or Commander in Chief, is to give Eleven Pieces, his Vice-Admiral Nine, and his Rear-Admiral Seven, and the other proportionably leſs by two, according to their Ranks; but the Commander or Captain of a Ship is not to ſalute his Admiral

Artic. 38.

or

or Commander in Chief, after he had done it once, except he hath been abſent from the Flag Two Months.

VIII. When a Ship of the ſecond Rate ſhall carry any Ambaſſador, Duke or Nobleman, at his coming aboard he is to give Eleven Pieces, and at his Landing Fifteen; and when he ſhall carry a Knight, Lady or Gentleman of Quality, at their coming aboard he is to give ſeven, and at their Landing eleven; and the other Ships are to give leſs by two, according to their Ranks and Number, of Ordnance.

IX. When an Admiral of any Foreign Nation is met with, he is to be anſwered with the like Number by all the Ships he ſhall ſalute; if a Vice-Admiral, the Admiral is to anſwer him with twelve leſs; but the Vice-Admiral and Rear-Admiral, and as many of the reſt as he ſhall ſalute, ſhall give him the like number; if a Rear-Admiral, then the Admiral and Vice-Admiral to anſwer him with two leſs; but if he ſhall ſalute the Rear-Admiral or any other, they are to anſwer him in the like Number.

X. When a Man of War or Merchant Man of another Nation, or of our own, ſalutes any of the King's Ships, he is to be anſwered by two leſs.

XI. When any of the Captains of his Majeſty's Ships ſhall have occaſion to ſalute any of the King's Caſtles, he is to give two Guns leſs than they are directed to give upon ſaluting their Admiral or Commander in Chief, as aforeſaid: But this extends only to time of Peace; for if War is begun, no Guns ought to be fired in Salutes, unleſs to the Ships or Caſtles of ſome Foreign Prince or State in Amity.

XII. Thoſe Duties or Obligations being laid on *Commanders*, they conſiſt of two parts; the one is that antient preſcription, which the *Crown of England* claims by virtue of the Soveraignty of that *Empire*; the other is but that Reſpect which is paid as viſible Marks of *Honour* and *Eſteem*, either to Kingdoms or Perſons publick or private, to whom theſe ſeveral Commands are to be obſerved; and yet in theſe which are both innocent and harmleſs of themſelves, we want not thoſe, who being empty of all that may be called good, want not malice to ſtart up words, *Wherefore ſhould the Lives of Men, even* Chriſtian

Men, be expoſed to death and ſlaughter for ſhadows (as they call them) *the Right of Salutation* or Compliment being no other in their Opinion.

XIII. Admitting therefore that the Evidence of original Compacts and Rights ſtand at ſuch remote diſtances from us, that they are hardly diſcernable, and that the principal of Civil things, as well as natural, is ſought for in a Chaos or Confuſion; ſo that the Evidence of antient facts *veſtigia nulla retrorſum*, there being no infallible marks of their pre-exiſtence (one ſtep doth ſo confound and obliterate another) and that time itſelf is but an imagination of our own, an intentional, not a real meaſure for actions, which paſs away concomitantly with that meaſure of time in which they were done, for which reaſon we talk of antient things, but as blind Men do of Colours: Notwithſtanding preſcription is ſuppoſed by moſt to hold out ſuch an Evidence, that as they ſay, it ought to ſilence all Counterpleas in all Tribunals, and by the preſent allowance which is indulged to it, it either proves a good or cleanſes a vitiated Title; and hath this power in the civil Conſtitution of the World, that for Quietneſs ſake what it cannot find, we grant it a power to make.

Coke on *Littleton, fol.* 113, 114.

And if we examine all this ſtrictly at the two great Tribunals, the external and the internal, and argue the *Jus* of it, as Stateſmen and Lawyers do, we can then raiſe the Argument of it no higher in the external or temporal Court, than only this —— *That it is very convenient it ſhould have the effects of Right; leſt Properties and Dominion of things ſhould be uncertain, and by the apparent negligences of Time Owners ſhould be puniſhed; and that Controverſies may have a ſpeedy end:* States looking more after publick repoſe and quiet than after ſtrict Virtue; and more after thoſe things which are *ad alterum*, than that which concerns a Man's own ſelf; for, ſay they, *The Gods look well enough after their own Injuries:* States meddle not ſo much with great Prodigalities as in petty Larcenies, *our chiefeſt Liberty, Privileges, or Prerogative in this World, conſiſting only in an uncontroulable Right, which we have to undo ourſelves, if we pleaſe.* Certainly if we plead at the other *Tribunal*, as conſcientious Lawyers, we muſt give our ultimate Reſolution out of that Law, *Quæ*

Deorum injuriæ Diis curæ.

inciditur

inciditur non ære, ſed animis: which is not engraved in Tables of Braſs, but in the Tables of our Souls; for the Rule of Law tells us, *Quæ principio vitiantur, ex poſt facto reconvaleſcant*, and that preſcription or uſu-caption (which is but the lapſe of ſo much Time) hath the power to make *Wrong a Right*; yea, to change the morality of an Action, and turn Quantity into Quality: Upon the Reſult of all which taking for granted, what thoſe ſtubborn People do hold, that inſtead of being a right, or a certain Cauſe or Proof of it, it only makes a ſhadow or an opinion of right.

XIV. And when we have taken thoſe People by the hand, and with eagerneſs run with them to the very bottom and end of the line, and there find nothing, we are but in *Pompey*'s Aſtoniſhment, when after his Conqueſt of *Jeruſalem*, when he had with ſuch reverence and curioſity viſited the *Sanctum Sanctorum*, and found nothing there but a pair of Candleſticks and a Chair, in which there was no God ſitting; yet for all this Miſtake, he would not (as *Joſephus* ſaith) diſorder or rob the Temple, which he took by force of Arms, becauſe *the very Opinion of Religion hath ſomething of Religion*; (which made *Jacob* accept of *Laban*'s Oath by an *Idol*) ſo ought not we for defect of giving the Cauſes of the Inception of Preſcription, or of the Right in Preſcription diſorder a State, or be the occaſion of ſetting of two Nations at enmity; nay, though in Conſcience we are ſatisfied that it contains but the Opinion or Shadow of Right: And as to the involving the Lives of the Innocent, there is no ſuch thing in the matter, for there is not required any thing which they do not owe, nor are they deſigned to Death; but if the Cauſe be ſuch, that they that are Innocent muſt periſh, that is, be expoſed to Death by their Rulers becauſe they obſtinately will not yield that which is right, but will involve the Lives of their innocent Subjects by Force, to defend that which is wrong, ſuch guilty Governors muſt anſwer for the Defect of their own evil Actions: on the other hand, there can be no doubt made, but he that hath an undoubted Right, being a Soveraign, the Subjects partake in the ſame, and the Indignity offered to him, they immediately become Partakers in the Suffering, for the Satisfaction of which they may, yea, are

Machiavel's Diſcourſes, *cap.* 11.

obliged both by the Law of God and Nations to ſeek Reparation (if their Prince ſhall command) *vi, & manu forti*, by the Hazard of their Blood and Lives.

XV. On the other Hand, as War introduces the greateſt of Evils, *viz.* the taking away of Men's Lives, and that which is equivalent to Life; ſo right Reaſon and Equity tells us, that it ought not to be undertaken without the greateſt Cauſe, which is the keeping of our Lives, and that without which our Lives cannot be kept; or if they ſhould be kept, yet they would not be of any value to us, ſeeing there may be a Life worſe than Death, even Captivity; wherefore as we are forbidden to go to Law for a little Occaſion, ſo we are not to go to War but for the greateſt. Now thoſe things that are equivalent to a Man's Life, are ſuch to whom *Almighty God* appointed the ſame equal Puniſhment as to Murderers, and ſuch were breakers into Houſes, breakers of Marriage-fidelity, Publiſhers of falſe Religion, and thoſe who rage in unnatural Luſts, and the like.

However, before Men's Perſons or Goods are to be invaded by War, one of theſe three Conditions is requiſite.

1. Neceſſity, according to the tacit Contract in the firſt dividing of Good, as hath been already obſerved.

2. A Debt.

3. A Man's ill Merits, as when he doth great Wrong, or takes part with thoſe who do it.

Againſt which if any thing is committed, War may be commenc'd, nor is the ſame repugnant to the Laws of Nature; that is, whether the thing may not be done unjuſtly, which hath a neceſſary Repugnance to the rational and ſocial Nature; amongſt the firſt Principles of Nature, there's nothing repugnant unto War; on the other hand there is much in favour of it, for both the end of War, the Conſervation of Life and Members, and the keeping and acquiring of things uſeful unto Life, is moſt agreeable to thoſe Principles; and if need be, to uſe Force to that Purpoſe is not diſagreeable, ſince every living thing hath by the Gift of Nature Strength, to the end it may be able to help and defend itſelf. Beſides, Reaſon and the Nature of Society, inhibits not all Force, but that which is repugnant

Ulpian Leg. 1. ... vim. vi. ... vi, & ... na.

nant to Society, that is, which depriveth another of his Right; for the end of Society is, that every one may enjoy his own; this ought to be, and would have been, though the Dominion and Property of Poſſeſſions had not been introduced; for Life, Members and Liberty would yet be proper to every one; and therefore without Injury could not be invaded by another: To make uſe of what is common, and ſpend as much as ſuffices Nature, would be the right of the Occupant, which Right none could without Injury take away. And this is proved by that Battle of *Abraham* with the four Kings, who took Arms without any Commiſſion from GOD, and yet was approved by him; therefore the Law of Nature was his Warrant, whoſe Wiſdom was no leſs eminent than his Sanctity, even by report of *Heathens*, *Beroſus* and *Orpheus*; nor is the ſame repugnant to the *Hebrew* Law or *Goſpel*, as the ſame is moſt excellently proved by the *Incomparable Grotius* *.

* *Lib.* 1. *cap.* 1.

XVI. On the other hand, the Fear of uncertain Danger, as building of Forts, Caſtles and Ships, and the like, though the former be on Frontiers, the refuſing of Wives (when others may be had) the changing of Countries either Barren or Mooriſh for more fertile or healthful which may juſtly be done; as in the Caſe of the old *Germans*, as *Tacitus* relates: So likewiſe to pretend a Title to a Land, becauſe it was never found out or heard of before; that is, if the ſame be held by a People that are under a Government; nay, though the Government be wicked or think amiſs of GOD, or be of a dull Wit; for Invention is of thoſe things that belong to none; for neither is moral Virtue, or Religion, or Perfection of Underſtanding required to Dominion; but yet if a new Place or Land ſhall be diſcovered, in which are People altogether deſtitute of Reaſon, ſuch have no Dominion, but out of Charity only is due unto them what is neceſſary for Life; for ſuch are accounted as Infants or Mad-men, whoſe Right or Property is transferred, that is, the uſe of the ſame, according to the Law of Nations; in ſuch Caſes a charitable War may be commenc'd.

Victor. de Ind. rel. 1. *n.* 31.

Victor de Jure Belli, n. 5, 6, 7, 8.

XVII. To prevent all the ſad Calamities that muſt inevitably follow the ungoverned Hand in War, Faith muſt by all Means be laboured for; for by that, not only every

every Common-Wealth is conſerved, but alſo that greater Society even of Nations, that once being taken away, then farewel Commerce, for that muſt be then taken away from Man; for Faith is the moſt Sacred thing that is ſeated in the Breaſt of Man, and is ſo much more religiouſly to be kept by the ſupreme Rulers of the World, by how much more they are exempted from the Puniſhment of their Sins here than other Men: Take away Faith, and then Man to Man would be (as Mr *Hobbes* obſerves) even Wolves; and the more are Kings to embrace it, firſt for Conſcience, and then for Faith and Credit ſake, upon which depends the Authority of their Government. The Ambaſſadors of *Juſtinian* addreſſed their Speech to *Choſroes* after this manner: *Did we not ſee you here with our own Eyes, and pronounce theſe Words in your Ears, we ſhould never have believed that* Choſroes *the Son of* Cabades, *would bring his Army, and enter forcibly into the* Roman *Bounds, contrary to his Leagues, the only Hope left to thoſe that are afflicted with War? For what is this, but to change the Life of Men into the Life of wild Beaſts? Take away Leagues, and there will be eternal Wars, and Wars without end will have this Effect, to put Men beſides themſelves, and diveſt them of their Nature.* If then a ſafe Peace may be had, it is well worth the releaſing of all or many Injuries, Loſſes, and Charges, according to that in *Ariſtotle*: *Better it is to yield ſome of our Goods to thoſe that are more Potent, than contend with them and loſe all*; for the common Chances of War muſt be conſidered, which if ſo, the Scope of the principal part of this Firſt Book may be avoided, and we let into the peaceable Track of Traffick and Commerce.

Procopius Perſic. 2.

The End of the Firſt Book.

BOOK

BOOK II.

CHAP. I.

Of the various Rights and Obligations of Owners and Partners of Ships in Cases private.

I. *Of* Navigation *in general.*
II. *Of* Owners *their ſeveral Powers over thoſe Veſſels they are Partners in. Trover for a part of a Ship.*
III. *Where Ships are obliged to make a Voyage before they can be ſold; and what may be done when part proteſt againſt a Voyage.*
IV. *The Maſter how brought in by the Owners, and the reaſon why in ſuch a Manner.*
V. *Where the Owners ought to be repaired for the Damages of the Maſter.*
VI. *Where Ships broke in pieces determine the Partnerſhip as to the Veſſel, and where not.*
VII. *Where a Ship ſhall be the Builder's, and where only his whoſe Materials ſhe was erected with.*
VIII. *Where Property of the Veſſel altered changes not that of the Boat.*
IX. *A Ship for the act of Piracy becomes forfeited; yet if* bonâ fide *ſold, where the Property may be queſtioned.*
X. *Monies borrowed by the Maſter, where the ſame obliges the Owners, and where not.*
XI. *Whether he that obtains an unlawful poſſeſſion of a Ship, ſhall anſwer the full Freight to the Owners.*
XII. *And where the Owners ſhall have their Freight, though they loſe their Lading.*
XIII. *Where a Ship may become a Deodand, and where not. Not forfeited till Condemnation.*
XIV. *How recoverable by the Laws of* England.
XV. *Foreign Ship naturaliz'd upon ſale needs not to make Oath again upon the New Act.*
XVI. *Forfeitures for delivering Goods without paying the Duties.*

I. IN the precedent Book having obſerved ſomething of the Rights of Perſons and of Things in a ſtate of *Nature*, and how neceſſarily they came at firſt to be appropriated, and how equitably they are now continued in the poſſeſſion of thoſe to whom they are conſigned by the *donation* of others, by the *Laws of Nations*, and maintained

tained or deſtroyed by the equity of thoſe various Laws which rule and govern them in reference to matters *publick*, all which is juſtified by the Scripture itſelf: It may not now ſeem improper to examine the *private cauſes* changing the ſame, and of the contingencies and advantages that wait on that which we properly call Commerce.

The Great Creator having finiſhed his Mighty Work, and given Man that Dominion which he now enjoys, as well over the Fiſh in the Seas, as the Beaſts in the Field, he was not forgetful of beſtowing on him thoſe things which were neceſſary for the Government and ſupport of the ſame, creating at the ſame time Trees which grow as it were ſpontaneouſly into Veſſels and Canoos; which wanted nothing but launching forth to render them uſeful for his accommodation, which afterwards he by his Divine Genius (inſpired by that Mighty One) finding Materials, hath ſince ſo compleated and equipped, as to render it the moſt beautiful and ſtupendious Creature (not improperly ſo called) that the whole World can produce, which being not retarded by lett of Winds, or other contingent accidents, ſubmits itſelf to plow the unknown paths of that vaſt Element, to brave all Encounters of Waves and Rocks, to fathom and ſurvey the vaſt immenſities of the very World itſelf, to people, cultivate, and civilize uninhabited and barbarous Regions, and to proclaim to the Univerſe the Wonders of the *Architect*, the Skill of the *Pilot*, and, above all, the Benefits of *Commerce*; ſo that it is no wonder at this day to find Nations contending who ſhould ſurpaſs each other in the Art of Navigation, and to monopolize if poſſible, the very Commerce and Trade of the World into their hands; and that, all by the means of this moſt excellent Fabrick.

Aretin. poſt Joan. Faber. in §. item exercitor. num. 3. Inſt. de oblig. quæ ex quaſi delict.

II. Hence it is, that Ships and Veſſels of that kind being originally invented for uſe and profit, not for pleaſure and delight, to plow the Seas, not to lie by the Walls, to ſupply thoſe of the Mountains as well as thoſe on the Sea Coaſts.

Therefore upon any probable deſign the major part of the Owners may even *againſt the conſent*, though not without the *privity* and knowledge of the reſt, freight out their Veſſel to Sea.

If

If it ſhould ſo fall out that the major part *proteſt* againſt the Voyage, and but one left that is for the Voyage, yet the ſame may be effected by that party, eſpecially if there be *equality* in Partnerſhip.

But the Admiralty compels them to give Security for her ſafe Return; and the Recognizance may be ſued there. L. *Raym.* 223. S. P. *ibid.* 1285.

But, where two Part-Owners ſent out the Ship, without the Conſent of the third, and ſhe was loſt; the third muſt bear his Proportion of the Loſs, becauſe he would have had his Share of the Profits, if any. 1. *Vern.* 297. But note in this Caſe there had been no previous Application to the Admiralty, as there ought to have been.

The Account of the Voyage ſettled by a major part of the Part-Owners, binds the reſt. 1 *Vern.* 465.

As an encouragement to the Building of Ships being of that univerſal Advantage to the Publick in point of Trade, and Commerce, to contrive and veſt the Owners propriety in them, both by the Common Laws of this Realm, and the Maritime Laws, it is provided that in caſe a Ship be taken away or the Owners diſpoſſeſſed, they may maintain an Action of Trover and Converſion for an 8th, a 16th, or any other Part or Share of the ſame.

Tenants in Common of a Ship.

In an Action on the Caſe, the Plaintiff declared that he was Owner of the 16th part of a Ship, and the Defendant Owner of another 16th Part of the ſame Ship, and that the Defendant fraudulently and deceitfully carried the ſaid Ship *ad loca tranſmarina*, and diſpoſed of her to his own uſe, by which the Plaintiff loſt his 16th part to his damage: On not guilty pleaded, and verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Action did not lie, for tho' it be found deceptive, yet this did not help it, if the Action did not lie on the ſubject matter; and here they are Tenants in Common of the Ship, and by *Littleton* between Tenants in Common there is not any Remedy, and there cannot be any fraud between them, becauſe the Law ſuppoſes a truſt and confidence betwixt them; and upon theſe Reaſons Judgment was given *quod Querens nil capiat per billam.* *Litt.* §. 323. 1 *Inſt.* 199. *b.* 200. *a.* *Salk.* 290, 392.

Graves

Graves againſt *Sawcer*, *Raym.* 15. 1 *Levinz* 29. and 1 *Keeble* 38. 3 *Leon.* 228. *Bennington* againſt *Bennington.*

Leg. Fin. C. §. pro Socio & poſs. inſt. & D. eod.

III. Owners by Law can no ways be obliged to continue their paction or partnerſhip without ſundering; but yet if they will ſunder, the *Law Marine* requires ſome conſiderations to be performed before they can do ſo. And therefore if the Ship be newly built, and never yet made a Voyage, or is newly bought, ſhe ought to be ſubject to one Voyage upon the common out-read and hazard, before any of the Owners ſhall be heard to ſunder and diſcharge their parts; but by the Laws of *England* the Owners may, before any ſuch Voyage, ſell or tranſmit their Right.

Leg. in hoc parag. ſi conveniat pro Sco.

Bart. & Paul. in Leg. hæc diſtinctio §. cum fundum ff. locat.

If it falls out that one is ſo obſtinate that his conſent cannot be had, yet the Law will enforce him either to hold, or to ſell his proportion; but if he will ſet no price, the reſt may out-rigg her at their own coſts and charges, and whatſoever Freight ſhe earns, he is not to have any ſhare or benefit in the ſame. But if ſuch Veſſel happens to miſcarry or be caſt away, the reſt muſt anſwer him his part or proportion in the Veſſel.

Gloſſ. Leg. ſi navis & juris in Leg. utique para culpæ de rei undic. & Leg. arboribus. §. navis de uſufruct.

But if it ſhould fall out that the major part of the Owners refuſe to ſet out the Veſſel to Sea, there by reaſon of the unequality they may not be compelled; but then ſuch Veſſel is to be valued and ſold: The like where part of the Owners become deficient or unable to ſet her forth to Sea.

Leg. non aliter F. de uſu & habi.

IV. The Maſter of the Veſſel is eligible by the Part-Owners in proportion, not by the majority, and he that is moſt able is to be preferred. The Wiſdom of the latter Ages have been ſuch, that few have gone out in that condition, but thoſe that have commonly had ſhares or parts in the ſame Veſſel. In the preferring therefore of a Maſter, his ability and honeſty is to be conſidered, ſince on him reſts the charge not only of the Veſſel, but of the Lading; their very actions ſubjecting the Owners † to anſwer for all damage that ſhall be ſuſtained by him or his Mariners, be it in the Port or at Sea, to the Lading or Goods of the Merchant or Laders, and they are made liable as well by the Common Laws,* of *England*, as the Law † Marine.

†4 *Inſtit.* 146.

18 *H.* 8. *n.* 58.

* *Hill.* 23 *Car.* 2. *B. R. Morſe verſus Slue.*

† *Nautæ Caup. Stab. Leg.* 1. *Sect.* 3.

V. If

V. If the Maſter commits offences either negligently or wilfully, he ſhall be reſponſible over to his Owners for the reparation of damage; nor are they bound to join, but may ſever and ſue apart as well by the *Common Law* * as the Marine: So likewiſe if the Ship hath earned Freight, and part of them receive their parts, the reſt may bring their Action for their ſhare without joining with the others.

* *Stanley verſus Aylet.* 3 *Keeble* 444.

Maſters and Owners reſponſable.

The Defendant and ſeven other Perſons were proprietors of a Ship, in which Goods were uſually tranſported for hire, and the Plaintiff *onerat* Goods upon the Ship to be carried for hire, from *London* to *Topſham* in *Comitatu Devon*, and that the Defendant received them, and undertook to bring them to *Topſham*, but that he not being careful of his Duty but neglecting it, *tam improvidentur* placed and carried the ſaid Goods, that tho' the Ship ſafely arrived at *Topſham*, yet the Goods were ſpoiled. And upon *non culp*. pleaded. The Jury found a ſpecial Verdict, *viz.* That the Defendant and ſeven other Perſons were Proprietors and Part-Owners of the Ship, that the Ship had a Maſter *locat* in her by the Part-Owners who had 60 *l.* Wages for every Voyage between *Topſham* and *London*, that the Goods were delivered to the Maſter, none of the Part-Owners being preſent, and that there was not any Contract made with them or any of them by the Plaintiff, that the Ship arrived ſafe to *Topſham* but the Goods were ſpoiled. *Et ſi pro Quer' pro Quer' ſi non pro* Def.

And two points were made.

1. If the Proprietors are chargeable no Contract being made with them, and there being a Maſter that is chargeable in reſpect of his Wages, according to the Caſe of *Morſe* and *Slue*, yet *per Holt Ch. Juſtice* clearly, that tho' the Maſter be chargeable in reſpect of his Wages, ſo are the Proprietors in reſpect of their Freight that they receive for the carriage of the Goods, at the Election of the Plaintiff.

2. If the Action lay againſt the Defendant alone, it appearing that there are other Part-Owners not made Defendants; and held that the Action did not lie againſt him ſole, but ought to have been againſt all the Part-Owners,

Owners, for all the Part-Owners are chargeable in reſpect of the Profit they make by the carriage of the Goods, and that in point of Contract upon their undertaking, be it implied or expreſs, and are not chargeable as Treſpaſſers, for then one might be chargeable alone, but in point of Contract upon their Receipt of the Goods to be carried for hire. Judgment *pro Defen.* as by 3 *Mod.* 321. *Boſon con. Sanford* 3 *Levinz.* 258. where it is with a *Cur. adviſare, mes le Reporter ut audivit* Judgment *pro Defen.*

Leg. inter ſtipulantem in §. *Sacram ff. de ver. oblig.*

VI. If a Ship be broken up or taken in pieces, with an intent to convert the ſame to other uſes; if afterwards upon advice or change of mind, ſhe be rebuilt with the ſame Materials, yet this is now another, and not the ſame Ship, eſpecially if the Keel be ript up or changed, and the whole Ship be once all taken aſunder and rebuilt, there determines the Partnerſhip *quoad* the Ship. But if a Ship be ript up in parts, and taken aſunder in parts, and repaired in parts, yet ſhe remains ſtill the ſame Veſſel and not another; nay though ſhe hath been ſo often repaired that there remains not one ſtick of the Original Fabrick.

Leg. quod in §. *fin. F. de Leg.*

Leg. Muſius ff. de rei vindic.

VII. If a Man ſhall repair his Ship with Plank or other Materials belonging to another, yet the Ship maintains and keeps her firſt Owners.

ff. lib. 6. *tit.* 1. *leg.* 61.

But if a Man take Plank and Materials belonging to another, and prepared for the uſe of Shipping, and with them build a Ship, the property of the Veſſel follows the Owners of the Materials and not the Builder.

Leg. ſi ex meis, ff. de acq. rer. dom. & *Leg. ſi convenerit* §. *ſi quis ſic. ff. de pign. act.*

But if a Man cut down the Trees of another, or takes Timber or Planks prepared for the erecting or repairing of a Dwelling-Houſe; nay, though ſome of them are for ſhipping, and builds a Ship, the Property follows not the Owners but the Builders.

Leg. Marcellus in §. *armamenta. ff. de rei vindicat.*

VIII. If a Ship be ſold together with her Tackle, Furniture, Apparel, and all other her Inſtruments thereunto belonging, yet by theſe words the Ship's Boat is not conveyed, but that remains ſtill in the Owners; ſo it is if the Ship be freighted out, and afterwards at Sea ſhe commits Piracy: The Ship is forfeited, but the Boat remains ſtill to the Owners †.

† Rolls Abridg. 530. *Bald. in Leg. cum proponas Cod. de Nautic. è fœnore, num.* 6.

And

And though Ballaſt is generally uſed in Shipping by thoſe Ships that are freighted outwards, in order to bringing home of Goods, yet is not the ſame any part of the Furniture of the Veſſel; and ſo it was adjudged in debt on Bond, The Condition was, that whereas the Plaintiff had bought of the Defendant a Ship, if the Plaintiff ſhall enjoy the ſaid Ship with all the Furniture belonging to the ſame, without being diſturbed for the Ship or any Furniture appertaining to it, that then, &c. And the caſe fell out to be, that after the ſale of the Ship, a ſtranger ſued the Plaintiff for certain monies due for Ballaſt bought by the Defendant for the ſame Ship, in which Suit he obtained Sentence, upon which the Ship was ſeized, The Queſtion was, If Ballaſt be Furniture for a Ship or not, it was reſolved that it was not; for though it may be as neceſſary as Sails, yet it is not always ſo, for ſometimes they ſail without Ballaſt, for the Merchandize itſelf may be ſufficient to anſwer that purpoſe. *Linter's* Caſe, *Leon.* 46, 47.

IX. If a Ship commits a Piracy, by reaſon of which ſhe becomes forfeited, if before ſeizure ſhe be *Bona fide* ſold, the property ſhall not be queſtioned, nor the Owners diveſted of the ſame. *Bingley's* Caſe, *Rolls* Abridg. *fol.* 530. *Dig. lib.* 14. *tit.* 1. §. 17.

A Mortgagee of a Ship, by Deed, intruſts the Mortgager with the original Bill of Sale; the Mortgager indorſes thereon ſubſequent Mortgages or Bills of Sale of ſeveral Parts of the Ship, the firſt Mortgagee acquieſces, he ſhall be poſtponed. 1. *P. Williams* 393, 394.

X. If a Maſter ſhall take up Monies to mend or victual his Ship where there is no occaſion, though generally the Owners ſhall anſwer the fact of the Maſter, yet here they ſhall not, but only the Maſter. But if there were cauſe of mending the Ship, though the Maſter ſpend the Money another way, yet the Owner and Ship become liable to the ſatisfaction of the Creditor; for it were very unreaſonable that the Creditor ſhould be bound to take upon him the care of repairing the Ship, and ſupply the Owners room, which muſt be ſo, if it ſhould be neceſſary for him, to prove that the Money was laid out upon the Ship; ſo on the other hand, it ſtands with reaſon that he be ſure that he lends his Money on ſuch an occaſion as whereby the Maſter's fact may oblige the Owners, which he cannot do otherwiſe, unleſs he knows that the Money borrowed was *Bridgman's* Caſe, *Hobart, fol.* 11, 12. *Moo.* 918.

Gloſſ. African. ſuper eod. leg. & §. neceſſary for the repair of the Ship; and therefore if the Ship wanted ſome repairs, and a far greater and more extravagant ſum was lent than was needful, the Owners ſhall not be liable for the whole.

1. *P. Williams* 395. The *Eaſt-India* Company's Agent in the *Indies* bought a Ship and her Cargo of the Commander, who had no Power to ſell her; the Owner had the Value decreed for Ship and Cargo (the Value being found by a Jury) and *Indian* Intereſt, *viz.* 12 *l. per Cent.*

*Dig. lib.*6. *tit.* 1. 62. & *lib.* 7. *tit.* 1. 12. §. 1. & *Papinian* on the ſame Law. XI. If a man gets poſſeſſion of a Ship having no Title to the ſame, by the Law Marine, he ſhall anſwer ſuch damage as the Ship in all probability might have earned; and the reaſon of that is, becauſe the only end of Shipping, is the employment thereof: but if a Warrant be directed out of the *Admiralty* to the *Marſhal*, to arreſt ſuch a Ship and *Salvo Cuſtodire*, who by force of the ſame enters into the ſame Ship, though the Warrant does not mention that the Officer ſhould carry away the Sails of the ſame Ship, yet he may juſtify the taking the ſame, for that he cannot *Salvo Cuſtodire* the ſame Ship, unleſs he carries away the Sails. *Creamer verſus Jeckly, Latch. fol.* 188.

Digeſt. lib. 19. *tit.* 2. 61. *Scævola* on the ſame Law. XII. A Ship is freighted out, accordingly ſhe receives in her Lading purſuant to agreement, afterwards an Embargo happens, and the Lading is taken as forfeited, yet the Owners ſhall notwithſtanding receive Freight, for here is no fault in them, but only in the Merchant.

XIII. In *Aqua dulci* a Ship may become a Deodand, but in the Sea, or in *Aqua ſalſa*, being an Arm of the Sea, no Deodand of the Ship or any part of it, though any body be drowned out of it, or otherwiſe come by their death in the Ship; becauſe on ſuch waters, Ships and other Veſſels are ſubject to ſuch dangers upon the raging waves in reſpect of Wind and Tempeſt; and this diverſity all our antient Lawyers do agree in, and it does more eſpecially appear in the Parliament Rolls, where upon a Petition it was deſired, *That if it ſhould happen that any Man or Boy ſhould be drowned by a fall out of any Ship, Boat, or Veſſel, they ſhould be no Deodands:* Whereupon the King, by great advice with his Judges and Council learned in the Laws, made anſwer, *The Ship, Boat or Veſſel, being upon the Sea ſhould be adjudged no Deodand, but being upon a freſh River it ſhould be a Deodand* —— *but* (*3 Inſt. fol.* 58. *Rot. Parliam.* 51 *Ed.* 3. *num.* 73. 1 *R.* 2. *n.* 106. 4 *R.* 2. *n.* 33. 1 *H.* 5. *n.* 35.)

but the King will ſhew favour. There are abundance of other Petitions upon the like occaſion in Parliament.

A Ship lying at *Rotherhith*, in the County of *Kent*, near the ſhore, to be careen'd and made clean, it happened that one of the Shipwrights being at work under her at low Water, the Veſſel (then leaning aſide) fortuned to turn over the contrary ſide, by means of which the Shipwright was killed: Upon a Trial at Bar, where the Queſtion was, Whether this Deodand did belong to the Earl of *Salisbury*, who was Lord of the Manor, lying contiguous to the place where the Man was ſlain, or to the Almoner as a matter not granted out of the Crown? In that caſe it was reſolved, That the Ship was a Deodand, and the Jury thereupon found a Verdict for the Lord of *Salisbury*, that the ſame did belong to his Manor. *Mich.* 29 *Car.* 2. *in B. R.*

On Importation of prohibited Goods, the Ship cannot be ſeiz'd as forfeit till a Condemnation in the Exchequer thereon. *Horne* againſt *Ivye* 2 *Keeble* 604. *Vide* 1 *Ven.* 47. 1 *Sid.* 421. 1 *Mod.* 18.

XIV. Thus Men from their neceſſity and ſafety having from hollow Trees, nay Reeds, Twigs and Leather (for ſuch were the rude beginnings of thoſe ſtupendious things we now admire) advanced the Art to that degree, as to render it now the moſt uſeful thing extant; and as the Mathematicks, Aſtronomy and other Sciences have added to its ſecurity, ſo have ſucceeding Ages from time to time, provided Privileges and Laws by which it hath always been regulated and governed, the which upon all occaſions, and in all Courts have generally had a genuine conſtruction as near as might be to the Marine-Cuſtoms; and therefore at this day, if a Ship be taken away, or the Owners diſpoſſeſt, they may maintain an Action of Trover and Converſion for an eighth or ſixteenth part of the ſame, as well by the Common Laws of this Kingdom, as the Law Marine, and they need not join with the reſt of their Owners.

XV. Upon an information *tam quam*, grounded upon the Act of Navigation, for importing Goods in a Foreign Ship contrary to that Act, The queſtion was, whether or not, if a Foreign Ship naturalized by the new Act, being a Prize taken in the late War with *Holland*, be afterwards ſold to a Foreigner, who ſells her again to an *Engliſh* Man, whether or no the Oath muſt be taken again according Ship Naturalized.

to the Act? *Per Curiam* it need not, becauſe that the Ship was once lawfully naturalized. *Hardres* 511. *Martin* againſt *Verdue*.

Forfeitures for delivering Goods without paying the Duties.

XVI. Stat. 4th and 5th *Will.* and *Ma. cap.* 15. §. 14. All perſons who by way of Inſurance, or otherwiſe, ſhall undertake to deliver any Goods imported from beyond Sea without paying the Duties payable for the ſame, or any prohibited Goods, ſhall forfeit 500 *l.*

§. 15. And all who ſhall agree to pay any Money, for the inſuring or conveying any Goods imported without paying the Duties, or any prohibited Goods, or ſhall receive ſuch prohibited Goods, or ſuch other Goods before the Duties are paid, knowing thereof; ſhall alſo forfeit for every Offence 500 *l.*

§ 16. And if the Inſurer or Manager of ſuch Fraud be the diſcoverer, he ſhall not only keep the Inſurance Money given him, and be diſcharged of the Penalties to which he is liable, but ſhall have one half of the Penalties impoſed upon the Parties making ſuch Inſurance or receiving the Goods as aforeſaid: And in caſe no diſcovery be made by the Inſurer, and the Party Inſured ſhall make diſcovery thereof, he ſhall recover back his *Præmium*, and have one Moiety of the Forfeitures impoſed upon the Inſurer, and be diſcharged of thoſe impoſed upon himſelf.

§. 17. The ſaid Penalties and Forfeitures to be recoverable according to the Courſe of the Exchequer.

§. 18. No Penalty to be recoverable, unleſs proſecuted within 12 Months after the Fact committed.

Vide Ch. xii. *Sec. ult.*

CHAP.

CHAP. II.

Maſters of Ships their Action conſidered in reference to caſes private and publick.

I. *A Maſter or Skipper his condition conſidered, in reference to his Intereſt and Authority generally. The Maſter only liable to Deviation and Barretry.*

II. *If Goods be loſt or imbezzled, or any other detriment happens in a Port, who ſhall anſwer. Maſter chargeable to pay the Duty of weighage.*

III. *The Duty of* Maſters of Ships, *as if they ſhall ſet Sail after an Embargo, who ſhall anſwer?*

IV. *Of Faults aſcribed to him before departure in tempeſtuous Weather, ſtaying in Port,* &c.

V. *Over-charging or over-lading the Ship above the Birth-mark; or receipt of ſuch Perſons on Ship-board as may hazard the Lading.*

VI. *Of Lading aboard in the Ships of Enemies, his own proving diſabled.*

VII. *Of ſhipping Goods elſewhere than at the publick Ports or Keys; and the taking in prohibited Goods.*

VIII. *Of wearing unlawful Colours or Flags, and of yielding up his Ship cowardly, if aſſaulted, where liable, and where excuſed.*

IX. *Of carrying fictitious Coquets and Papers, and refuſing payment of Cuſtoms and Duties.*

X. *Of ſetting Sail with inſufficient Tackle, and of taking in and delivering out with the like; and of his Charge of Goods till ſafely delivered.*

XI. *Of departing without giving notice to the Cuſtomer.*

XII. *Of Faults commited by Maſter and Skipper at Sea.*

XIII. *Rules in Law in the charging him for reparation of damage. Infant Maſter of a Ship ſueable in the Admiralty, for waſting or ſpoiling Goods.*

XIV. *Of the Power and Authority that the Maſter hath in diſpoſing Hypothecating or Pledging the Ship, Furniture and Lading.*

XV. *Where Maſters are diſabled, though in neceſſity, to impawn the Veſſel.*

XVI. *Where they may diſpoſe of Veſſel and Lading, and where not.*

XVII. *What Veſſels and Mariners the Maſter muſt have for importing in or exporting out of His Majeſty's Plantations in* Aſia, Africa, *and* America.

XVIII. *What Ships may go from Port to Port in* England.

XIX. *Ships not to import the Goods of any Country, but of that from whence they are brought.*

XX. *What time the Maſter ſhall be coming up after arrived at* Graveſend, *or at any other Port within the Realm, in order to his diſcharge.*

XXI. *Of going from Port to Port within the Realm how provided.*

XXII. *Of Goods prohibited to be imported from the* Netherlands *or* Germany *in any Ships whatſoever.*

I. A Maſter of a Ship is more than one, who, for his knowledge in *Navigation*, fidelity and diſcretion, hath the Government of the Ship committed to his care and management; and by the *Common Law*, (by which Properties are to be guided,) he hath no Property either general or ſpecial, by the conſtituting of him a Maſter; yet the Law looks upon him as an *Officer*, who muſt render and give an account for the whole charge, when once committed to his care and cuſtody; and upon failure to render ſatisfaction: And therefore if misfortunes happen, if they be either through negligence, wilfulneſs, or ignorance of himſelf or his Mariners, he muſt be reſponſible.

Leg. 1. *de Exercit. Act.*

Hob. Rep. fol. 11. *Bridgman*'s Caſe.

In Chancery.

A Maſter of a Ship, ſo appointed by B. Owner, treats with the Plaintiff to take the Ship to Freight for 80 Tuns to ſail from *London* to *Falmouth*, and ſo from thence to *Barcelona*, without altering the Voyage; and there to unlade at a certain Rate *per* Tun. And to perform this the Maſter obliges the Ship and what was therein, valued at 300 *l.* and accordingly a Charter-party was made and ſealed between the Maſter and the Merchant; but the Owners of the Ship were no Parties thereunto. The Maſter deviates and commits Barretry, and the Merchant, in effect, loſes his Voyage and Goods, for the Merchandize, being Fiſh, came not till *Lent* was paſt, and were rotten. The Merchant's Factor thereupon ſueth the Maſter in the Court of Admiralty at *Barcelona*, and upon an Appeal to a higher Court in *Spain*, hath Sentence againſt the Maſter and the Ship; which coming to his Hands (*viz.* the Merchant's Hands) the Owner brings an Action of Trover for the Ship; the Maſter ſues in Chancery to ſtop this Suit, and another Suit brought for the Owner for Freight, claiming deductions out of both, for his Damages ſuſtained by the Maſter, for the breach of the Articles by the Maſter, for if the Owner gives Authority to the Maſter to contract he ſhall bear the loſs, but in Caſe of Bottomry after a Voyage begun the Maſter cannot oblige the Owner beyond the Value of the Ship: But this Caſe is on Contract.

Lord-Chancellor. The Charter-Party values the Ship at a certain rate, and you ſhall not oblige the Owners farther,

ther, and that only with relation to the Freight, not to the value of the Ship; the Maſter is liable to the Deviation and Barretry, but not the Owners; elſe Maſters ſhould be Owners of all mens Ships and Eſtate, *Mich.* 29. *Car.* 2.

But where the Maſter of the Ship took Beef, Sails, &c. on Credit, and failed, the Owners were obliged to pay; and not allowed to defend themſelves by inſiſting that the Maſter was liable only, and that they had given him Money to pay the Plaintiff. He is but their Servant, and where he buys, they are liable, and continue ſo if he has not paid the Creditor, though they gave him Money for that Purpoſe. 2 *Vern.* 643.

II. If the fault be committed in any Port, Haven, River, or Creek, or any other place which is *infra Corpus Comitatûs*, the *Common Law* ſhall have] Juriſdiction to anſwer the party damnified, and not the *Admiralty*; but if the ſame be committed *ſuper altum mare*, the Admiralty ſhall have Juriſdiction of the ſame; yet if it be on a place where there is *diviſum imperium*, then according to the Flux or Reflux the Admiralty may challenge; the other of Common Right belonging to the *Common Law*. *Vide* 5. *Co.* 107. *Mo.* 891, 916.

The *Common Law* is the over-ruling Juriſdiction in this Realm; and they are to intitle themſelves well who would draw a thing out of it. L. *Raymond* 272.

And therefore ſo ſoon as Merchandizes and other Commodities are put aboard the Ship, whether ſhe be riding in Port, Haven, or any other part of the Seas, he that is *Exercitor Navis* is chargeable therewith; and if the ſame be there loſt or purloined, or ſuſtain any damage, hurt or loſs, whether in the Haven or Port before, or upon the Seas after ſhe is in her Voyage, whether it be by Mariners or by any other through their permiſſion, he that is *Exercitor Navis* muſt anſwer the damage, for that the very lading of the Goods aboard the Ship, does ſubject the Maſter to anſwer the ſame: And with this agrees the *Common Law*, where it was adjudged, That Goods being ſent aboard a Ship, and the Maſter having ſigned his Bills of Lading for the ſame, the Goods were ſtowed, and in the night divers Perſons, under the pretence that they were Preſs-maſters, entered the Ship and robbed her of thoſe F. *Naut. caup. ſtab. leg.* 1. *Sect.* 2, 3, 6, 7. 1 *Mod.* 85. *Raym.* 220. 1 *Ven.* 190, 238. 2 *Keb.* 866. 3 *Keb.* 72, 112, 132, 135.

thoſe Goods; the Merchant brought an Action at the *Common Law* againſt the Maſter; and the Queſtion was, Whether he ſhould anſwer for the ſame; For it was alledged on his part, That there was no default or negligence in him, for he had a ſufficient guard, the Goods were all lock'd up under Hatches, the Thieves came as *Preſs-Maſters*, and by force robb'd the Ship; and that the ſame was *vis major* †, and that he could not have prevented the ſame. And laſtly, That though he was called Maſter or *Exercitor Navis*, yet he had no ſhare in the Ship, and was but in the Nature of a Servant, acting for a Salary. But notwithſtanding it was adjudged for the Plaintiff, for at his peril he muſt ſee that all things be forth-coming that are delivered to him, let what accident ſoever happen; (the act of God, or an Enemy, perils and dangers of the Seas only excepted) but for Fire, Thieves and the like, he muſt anſwer, and is in the nature of a * Common Carrier; and that though he receives a Salary, yet he is a known and publick Officer, and one that the Law looks upon to anſwer, and the Plaintiff hath his Election to charge either Maſter or Owners, or both at his pleaſure, but can have but one Satisfaction.

† The which the Civil Law does ſometimes allow.

* *Rey.* 105. *F. N. B.* 104 *b.* 1 *Inſt.* 89. 4 *Co.* 84. *a.* *Mo.* 876. *Hob.* 17, 18. *Poph.* 178, 179. *Cro. Jac.* 188. 189, 330, 331. *Salk.* 388. 1 *Sid.* 36.

Debet Exercitor omnium nautarum ſuorum, ſive liberi ſint ſive ſervi, factum præſtare, nec immerito factum eorum præſtat, cum ipſe eos ſuo periculo adhibuerit: Sed non alias præſtat quam ſi in ipſa nave damnum datum ſit, cæterum ſi extra navim, licet à nautis, non præſtabit. Naut. Caup. Stabilit. Leg. 1. *Sect.* 7. *debet* Exercitor.

Eod. Leg. debet Exercitor.

If a Maſter ſhall receive Goods at the Wharf or Key, or ſhall ſend his Boat for the ſame, and they happen to be loſt, he ſhall likewiſe anſwer both by the Marine Law and the *Common Law*.

Mayor & Com. de London againſt *Hunt.*

Error of a Judgment in B. R. in Aſſumpſit brought by the Mayor and Commonalty againſt *Hunt*, where they declared of a Cuſtom, That they and their Predeceſſors, Majors, *&c.* had of every Maſter of a Ship 8 *s. per* Tun for every Tun of Cheeſe brought from any place in *England* to the Port of *London*, *ab oriente de London-Bridge*, in the name of Weighage; and that the Defendant being Maſter

ſter of a Ship, had brought to the Port of *London* ſo many Tuns, which at that rate came to ſo much, which he hath not paid; upon *non Aſſumpſit*, Verdict and Judgment for the Plaintiff. Upon which *Hunt* the Defendant, brought a Writ of Error, and two Errors were aſſigned. 1. That the Action did not lie againſt the Maſter, but, that the Duty was due from the Merchants, Owners of the Goods; but the Judgment was affirmed, for that the Maſter is intruſted with the Goods, and hath a Recompence from the Merchants for bringing the Goods, and is reſponſible for them, and therefore ſhall be charged for the Duty; and it would be infinite to ſearch for the Owners of the ſeveral Goods, which are all in the Cuſtody of the Maſter who brought them into Port, and therefore he ſhall be charged. 3. *Levinz* 37.

III. If Goods be laden aboard, and after an Embargo or Reſtraint from the Prince or State comes forth, and then he breaks Ground, or endeavours to ſail away, if any damage accrues, he muſt be reſponſible for the ſame. The reaſon is, becauſe his Freight is due and muſt be paid; nay, although the very Goods be ſeized as *bona contrabandos*. *Digeſt. lib.* 9. *tit.* 2. *Leg.* 61.

A Ship was hired to *J. S.* in *England* to freight at 3 *l.* 10 *s. per* Tun to *Bourdeaux*; then an Embargo is laid; ſhe afterwards proceeds to *Bourdeaux*; the Maſter, not diſcovering his firſt Agreement, agrees with the Correſpondents there of *J. S.* to allow him 6 *l.* 10 *s. per* Tun; upon this laſt Agreement he recovered at Law; and Equity would not relieve; becauſe the Performance of the firſt Agreement was hindered by the Embargo. 2 *Vern.* 242.

IV. He muſt not ſail in tempeſtuous Weather, nor put forth to Sea without having firſt conſulted with his Company *; nor muſt he ſtay in Port or Harbour without juſt cauſe when a fair wind invites his departure.

* *Leg. Oleron. Judg.* 2.

V. He muſt not over-charge or lade his Ship above the Birth-mark, or take into his Ship any Perſon of an obſcure and unknown Condition, without Letters of ſafe Conduct. *Stat* 18 *H.* 6. *cap.* 8.

VI. Nor ought he to lade any of his Merchant's Goods aboard any of the King's Enemies Ships (admitting his own Veſſel leaky or diſabled) without Letters of ſafe Conduct; otherwiſe the ſame may be made Prize, and he *Lib. ult. ad Leg. Rhod. & Leg. quum propenas C. de Naut. fœner. Stat.* 4 *H.* 4. 20.

he muſt anſwer the Damage that follows the Action.

Stat. 15 *H.* 6. *cap.* 8.

Nor ſhall he come or ſneak into the Creeks or other places, when laden homewards, but into the King's great Ports, (unleſs he be driven in by Tempeſt) for otherwiſe he forfeits to the King all the Merchandize, and therefore muſt anſwer.

1 *El. c.* 11. §. 2. 13, 14 *C.* 2. *c.* 11. §. 14. 19 *El. cap.* 9. 1, 2 *P.* & *M.* 5. 1 *Jac. cap.* 25. 12 *Car.* 2. *cap.* 18.

VII. Nor ought he to ſhip any Merchandizes, but only at the *Publick* Ports and Keys.

He muſt not lade any prohibited or unlawful Goods, whereby the whole *Cargo* may be in danger of Confiſcation, or at leaſt ſubject to ſeizure or ſurreption.

He may not ſet ſail without able and ſufficient Mariners both for quality and number.

By 5 *G.* 2. *ch.* 20. Maſters of Veſſels outward-bound are not to receive on board their Gunpowder, either as Merchandize or Ammunition (the King's Service excepted) before they be at, over-againſt, or below *Black-Wall*, on forfeiture of 5 *l.* for every 50 *lb.* Weight, &c.

By the ſame Act the Maſters of Ships coming into the *Thames* ſhall land their Powder before their Arrival at *Blackwall*; or within twenty-four Hours, if Weather permit, after they come to anchor there, or at the Place of unloading; forfeiture as in foregoing Section.

Keeping Guns ſhotted, firing a Gun above *Blackwall* before Sun-riſing or after Sun-ſetting, are alſo prohibited by the ſame Act, but under ſmaller Penalties, *viz.* A Gun ſhotted 5 *s.* a Gun fired 10 *s.* melting Pitch there on board is liable to a Penalty of 5 *l.*

Search may be made by an Elder-Brother of *Trinity-Houſe*, impowered under the Corporation Seal; and not permitting him to make due ſearch is liable to a Penalty of 5 *l.*

VIII. He may not uſe any unlawful Colours, Enſigns, Pendants, Jacks or *Flags* *, whereby his Ship or Lading may incur a Seizure, or the Cargo receive any detriment or damage.

* Proclamation *Sept.* 25. *An.* 26 *Car.* 2.

Per Leg. quum proponas ad Leg. Rhod. D. Leg. in fin. & *Leg. ſi vendita peric. rei vend.* & *Leg.* 5 & 6. *Naut. Caup.*

He muſt not ſuffer the Lading to be ſtoln or imbezzled; if the ſame be, he muſt be reſponſible, unleſs it be where there is *vis major*; as if he be aſſaulted at Sea either by Enemies, Ships of Reprize, or Pirates, there, if no Fault or negligence was in him, but that he performed the part of an honeſt, faithful, and valiant man, he ſhall be excuſed

cuſed. Yet it hath been adjudged, That if a Merchantman lies in a Port or Haven, and a Pirate, Sea-Rover, or other Thieves enter her and over-power her Men, and then rob her, yet the Maſter muſt be reſponſible; but if an Enemy enter and commit the depredation, there the Maſter is excuſed. 2 *Keble* 866, 3 *Keb.* 72, 112, 132, 135.

1 Ven. 190, 238. Raymond 220. 1 Mod. 85. 2 Levinz. 69.

IX. He muſt not carry any counterfeit Cocquets or other fictitious and colourable Ship-Papers to involve the Goods of the Innocent with the Nocent.

13 R. 2. cap. 9. Leg. 1. Cod. de Navib. non excuſand.

Nor muſt he refuſe the payment of the juſt and ordinary Duties and Port-charges, Cuſtoms and Imports, to the hazard of any part of his Lading; yet if he offers that which is juſt and pertains to pay, then he is excuſed.

Secund. fin. Leg. ult ad Leg. quam proponas C. d. Naut. fœnor. Leg. Oleron. 24. Per Leg. quant. de pub.

X. He muſt not ſet ſail with inſufficient Rigging or Tackle, or with other or fewer Cables than is uſual and requiſite, reſpect being had to the burden of the Veſſel: And if any damage happens by the delivery of the Goods into the Lighter, as that the Ropes break, and the like; there he muſt anſwer; but if the Lighter comes to the Wharf or Key; and then in taking up the Goods, the Rope breaks, the Maſter is excuſed, and the Wharfinger is liable.

If fine Goods, or the like, are put into a cloſe Lighter, and to be conveyed from the Ship to the Key, it is uſual there, that the Maſter ſend a competent number of his Mariners to look to the Merchandize, if then any of the Goods are loſt and imbezelled, the Maſter is reſponſible *, and not the Wharfinger; but if ſuch Goods are to be ſent aboard a Ship, there the Wharfinger, at his Peril, muſt take care the ſame be preſerved.

* *Paſch.* 26 *Car.* rul'd at *Guild Hall* by L.C.J. *Hale.*

XI. After his arrival at Port, he ought to ſee that the Ship be well moored and anchored; and after reladed, not to depart or ſet ſail till he hath been cleared; for if any damage happens by reaſon of any fault or negligence in him or his Mariners, whereby the Merchant or the Lading receives any damage, he muſt anſwer the ſame.

18 Eliz. cap. 9. 14 Car. 2. cap. 11.

XII. And as the Law aſcribes theſe things and many more to him as faults, when committed by him or his Mariners in Ports, ſo there are other things which the Law looks upon to be as faults in him in his Voyage, when done:

As

Digeſt. l. cum in debito F. de Probat.

As if he deviates in his courſe without juſt cauſe, or ſteers a dangerous and unuſual way, when he may have a more ſecure paſſage; though to avoid illegal impoſitions, he may ſomewhat change his courſe; nor may he ſail by places infeſted with Pirates, Enemies, or other places notoriouſly known to be unſafe; nor engage his Veſſel among Rocks or remarkable Sands, being thereto not neceſſitated by violence of Wind and Weather, or deluded by falſe Lights.

Lib. 1. Cod. de Navibus non excuſand.

The Maſter ſhall not be anſwerable for the Contracts of their Mariners; but they may be detained for their Crimes.

XIII. By the Marine Law, he that will charge a Maſter with a Fault, as in relation to his Duty, muſt not think that a general charge is ſufficient in Law, but he ought to aſſign and ſpecify the very fault wherewith he is ſo charged.

So he that will infer, that ſuch or ſuch a ſad diſaſter hath happened or been occaſioned by reaſon of ſome fault in the Mariners; muſt not only prove the fault itſelf, but muſt alſo prove that that fault did diſpoſe to ſuch a ſad event; or that ſuch a misfortune could not have happened without ſuch a fault precedent.

Infant Maſter of a Ship, liable to be ſued in the Admiralty.

If an Infant being Maſter of a Ship, by Contract with another, take upon him to bring certain Goods from *St Chriſtophers* to *England*, and there to deliver them, but delivers them not according to agreement, but waſtes and conſumes them, he may be ſued in the Admiral Court, altho' he be an Infant; for this Suit is but in Nature of a Detinue or a Trover and Converſion at the Common Law; and a Prohibiton denied for that Cauſe. *Furnes* againſt *Smith*. 1 *Rolls Abr*. 530.

XIV. When Voyages are undertaken, the Maſter is there placed in by the Owners, and they ought to make good the Maſter's fact and deed; † and therefore as the whole care and charge of Ship and Goods are committed to the Maſter, it is the prudence of the Owners to be careful who they will admit Commander of their Ship, ſince their actions ſubject them to anſwer the damage, or whatever other Act he ſhall do in reference to this Imploy; and therefore he can freight out the Veſſel, take in Goods and Paſſengers, mend and furniſh the Ship; and to that effect,

† *Recepit ſalvum fore, utrum ſi in navim res miſſæ ei aſſignatæ ſint, an etſi non ſint ei aſſignatæ, hoc tamen ipſo quod in navim miſſæ ſint,*

effect, if need be, in a ſtrange Country he may borrow Money, with advice of his Mariners, upon ſome of the Tackle, or ſell ſome of the Merchandize. If part of the Goods ſhall be ſold in ſuch neceſſity, the higheſt price that the remainder are ſold for, muſt be anſwered and paid to the Merchant; after which the Merchant muſt pay for the Freight of thoſe Goods as well as for the remainder, *Leg. Oleron.* 1. But if the Ship in the Voyage happens to be caſt away, then only ſhall be tendered the price that the Goods were bought for.

receptæ videntur, & omnium recepit cuſtodiam quæ in navim illatæ ſunt, & factum non ſolum nautarum præſtare debet, ſed & rectorum. F. Nautæ Caup. Stab. Leg. 1. Sect. recepit.

By the *Common Law*, the Maſter of a Ship could not impawn the Ship or Goods, for any Property either general or ſpecial was not in him, nor is ſuch power given unto him by the conſtituting of him a Maſter.

Yet the *Common Law* hath held the Law of *Oleron* reaſonable, That if a Ship be at Sea and takes leak, or otherwiſe want Victuals or other Neceſſaries, whereby either herſelf be in danger, or the Voyage may be defeated, that in ſuch caſe of neceſſity the Maſter may impawn for money or other things, to relieve ſuch extremities, by imploying the ſame to that end; and therefore he being the Perſon truſted with the Ship and Voyage, may therefore reaſonably be thought to have that power given to him implicitly, rather than to ſee the whole loſt..

Leg. Oleron. c. 22. *Hob.* 11, 12. *Latch* 252. *Noy.* 95. *Mo.* 918. *Leg. Oleron. c.* 1, 12. *Salk.* 34. *pl.* 7. *Lex Mercator* 102, 122.

A Ship put into *Boſton* in *New-England*, and there the Maſter took up Neceſſaries, and gave a Bill of Sale by way of Hypothecation, and there being a Suit againſt the Ship and Owners to compel Repayment, a Prohibition was prayed; whereupon the Court held, that the Maſter could not by his contract make the Owners perſonally liable to a Suit, and therefore granted a Prohibition as to them, but refuſed it as to the Ship; for the Maſter can have no credit but upon giving ſecurity by Hypothecation: And that it was unreaſonable for them to prevent the Court of Admiralty's giving a Remedy, when they could give none themſelves.

Salk. 35. *pl.* 9. 2 *Mod. ca.* 79. L. *Raymond*, 982. *S. C.*

But a Maſter, for any debt of his own, cannot Impawn or Hypothecate the Ship, *&c.* for the ſame is no ways liable but in caſe of neceſſity for the relief and compleating of the Voyage.

L. *Raymond*, 984. *S. C.*

Nor can he ſell or diſpoſe of the ſame without an Authority or Licence from the Owners; and when he does

1 *Siderf.* 453. *Vid.* 1 *Rolls. Abr.* 530. *pl.* 2.

Impawn

Impawn or Hypothecate the Veſſel or Furniture, he ought to have the conſent and advice of his Mariners.

Peer Williams 367. ſee L. Raymond 152, 806.

A Ship being repaired, *&c.* in the *Thames*, is not liable, but the Owners.

XV. And where the Ship is well engaged, ſhe is for ever obliged, and the Owners are concluded thereby till Redemption.

But in regard Maſters might not be tempted to engage the Owners, or infetter them with ſuch ſort of obligations, but where there is very apparent cauſe and neceſſity, they ſeldom ſuffer any to go Skipper or Maſter, but he that hath a ſhare or part in her; ſo that if Monies or Proviſions be taken up he muſt bear his equal ſhare and proportion with the reſt.

Judgment, Oleron, cap. 22.

Nor can the Maſter on every caſe of neceſſity impawn the Veſſel or Furniture; for if ſhe be Freighted, and he and the Owners are to join in the laying in of the Proviſions for the Voyage, and perhaps he wants money, (a great ſign of neceſſity) yet can he not impawn the Veſſel or Furniture, any other or further than for his own part or ſhare in her, the which he may transfer and grant as a man may do an eighth or fifth part in Lands or Houſes: But ſuch obligation of the Veſſel muſt be in Foreign parts, or places where the calamity or neceſſity is univerſal on the Veſſel, that will oblige all the Owners.

L. *Raymond* 577, 578.

Where a Ship was hypothecated at *Amſterdam*, the Party was allowed to ſue in the Admiralty here.

XVI. If the Veſſel happens afterwards to be wreckt or caſt away, and the Mariners by their great pains and care recover ſome of the ruins and lading, the Maſter in that caſe may pledge the ſame, the product of which he may diſtribute amongſt his diſtreſſed Mariners, in order to the carrying them home to their own Country: But if the Mariners no way contributed to the Salvage, then their reward is ſunk and loſt with the Veſſel. And if there be any conſiderable part of the Lading preſerved, he ought not to diſmiſs the Mariners, till advice from the Laders or Freighters; for otherwiſe perchance he may be made liable.

Judgment, Oleron. cap. 3.

If Merchants freight a Veſſel at their own charges, and ſet her to Sea, and ſhe happens afterwards to be Weather-bound, the Maſter may impawn either the Ship or

Lading

Lading at his pleaſure, or at leaſt ſuch as he could conveniently raiſe monies on, rather than ſee the whole Voyage loſt. And if he cannot pawn the Lading, he may ſell the ſame, that is, ſo much as is neceſſary; in all which caſes his act obliges.

Leg. Oleron. cap. 22.

However, Orders and Inſtructions are as carefully to be look'd upon and followed as the Magnet.

XVII. He is not to import into, or export out of any the *Engliſh* Plantations in *Aſia*, *Africa*, or *America*, but in *Engliſh* or *Iriſh* Veſſels, or of the Veſſels built and belonging to that Country, Iſland, Plantation, or Territory; the Maſter and 3 fourths of the Mariners to be *Engliſh*, upon forfeiture of Ship and Goods; and if otherwiſe, they are to be look'd upon as Prize, and may be ſeiz'd by any of the King's Officers and Commanders, and to be divided as Prizes, according to the Orders and Rules of the Sea.

The like proviſion on the like penalty is for Goods of *Muſcovy*, and of the Dominions and Territories of the *Czar*: So likewiſe of Currants belonging to the *Ottoman* Territories or Dominions.

All Goods of the Growth of his Majeſty's Plantations are not to be imported into *England*, *Ireland*, or *Wales*, Iſland of *Jerſey* or *Guernſey*, but in ſuch Veſſels as truly belong to Owners that are of *England*, *Ireland*, *Wales*, *Jerſey*, or *Guernſey*, and 3 fourths at leaſt of the Mariners are to be *Engliſh*, upon forfeiture of Ship and Goods.

Note, In caſes of ſickneſs, death, captivity, ſalves the Clauſe as to Mariners.

The Goods and Wares of thoſe Plantations, and brought in ſuch manner as aforeſaid, muſt be brought from thoſe very Countries of their ſeveral productions and growths, or from the Ports where they are uſually ſhipped out, on forfeiture of Ships and Goods.

XVIII. No Ship to go from Port to Port in *England*, *Ireland*, *Wales*, *Jerſey*, or *Guernſey*, or *Berwick*, unleſs the Owners are Denizens or Naturalized, and the Maſter and 3 fourths to be *Engliſh*.

That is thoſe that do not belong to *Engliſh*, *Iriſh*, *Welſh*, or thoſe of *Jerſey*, or *Guernſey*.

All Owners muſt ſwear that their Veſſels or Ships are their own proper Ships and Veſſels, and that no Foreigner hath any ſhare or part in her, and muſt enter the ſame; and that ſhe was bought for a valuable conſideration, *Bona fide*.

XIX. Nor to bring in any Goods from any place, but what are of the growth of that very Country, or thoſe places which uſually are for the firſt ſhipping, on pain of forfeiture of their Veſſel and Furniture.

This doth not extend ſo far, but that Maſters may take in Goods in any part of the *Levant* or *Streights*, although they

they are not of the very growth of the place, ſo that they be imported in *Engliſh* Ships, 3 fourths *Engliſh* Mariners: So likewiſe thoſe Ships that are for *India* in any of thoſe Seas to the Southward and Eaſtward of the *Cape of Good-Hope*, although the Ports are not the places of their very growth.

12 *Car.* 2. *cap.* 18.

Any People of *England* may import (the Maſter and Mariners 3 fourths *Engliſh*) any Goods or Wares from *Spain*, *Portugal*, *Azores*, *Madeira*, or *Canary* Iſlands; nay in Ships that are not *Engliſh* built, Bullion may be imported; ſo likewiſe in thoſe that are taken by way of Prize, *Bona fide*.

But Sugars, Tobacco, Cottons, Ginger, Indicoes, Fuſtick, or any other dying Wood of the growth of his Majeſty's Plantations, to be ſhipped, carried or conveyed from any of the *Engliſh* Plantations, are to be carried to no place in the World, but are to come directly for *England*, *Ireland*, *Wales*, or *Berwick*, upon pain of forfeiture of Ship and Goods; and the Maſter is to give Bond with one Security in 1000 *l.* if the Ship be under the burden of 100 Tuns, and 2000 *l.* if above; that upon Lading he brings his Ship directly into *England*, *Ireland*, *Wales*, or *Berwick*, (the danger of the Seas excepted) ſo likewiſe they are to do the ſame for the Ships that ſhall go from the Plantations, to the Governor of ſuch Plantation, upon forfeiture of the Ship and Goods.

By a late Act (3 *G.* 2. *c.* 28.) Rice is permitted to be carried South of *Cape Finiſterre* without firſt coming to *Great-Britain*.

12 *Car.* 2. *c.* 18.

XX. When the Maſter ſhall arrive at *Graveſend*, he ſhall not be above three days coming from thence to the place of diſcharge; nor is he to touch at any Key or Wharf till he comes to *Cheſter's* Key, unleſs hindered by contrary Winds, or draught of Water, or other juſt impediment to be allowed by the Officers: And likewiſe he or his Purſer are there to make Oath of the Burden, Contents and Lading of his Ship, and of the Marks, Number, Contents, and Qualities of every parcel of Goods therein laden to the beſt of his knowledge; alſo where and in what Port ſhe took in her Lading, and what Country built, and how manned, who was Maſter during the Voyage, and who the Owners; and in Out-Ports muſt come up to the place of unlading, as the condition of the Port requires, and make Entries, on pain of 100 *l.*

Nor

Nor is ſuch a Maſter to lade aboard any Goods outwards to any place whatſoever, without entring the Ship at the Cuſtom-Houſe, her Captain, Maſter, Burden, Guns, Ammunition, and to what place ſhe intends, and before departure to bring in a Note under his hand of every Merchant that ſhall have laid aboard any Goods, together with the marks and numbers of ſuch Goods, and be ſworn as to the ſame, on pain of 100 *l*.

No Captain, Maſter, Purſer of any of His Majeſty's Ships of War ſhall unlade any Goods before Entry made, on pain of 100 *l*.

Note, There is a Liſt of all Foreign built Ships in the Exchequer. No Foreign Ship not built in any of His Majeſty's Dominions of *Aſia*, *Africa*, or *America* after *Octob.* 1. 1662. and expreſsly named in the Liſt, ſhall enjoy the Privileges of a Ship belonging to *England* or *Ireland*, although owned and manned by *Engliſh*, except only ſuch as are taken by way of reprize, and condemnation made in the Admiralty as lawful Prize. None but *Engliſh* and *Iriſh* Subjects in the Plantations are to be accounted *Engliſh*.

XXI. If the Maſter ſhall have Freight from Port to Port within the Realm, he ought to have Warrant for the ſame, on pain of forfeiture of the Goods; and he is to take forth a Cocquet, and become bound to go to ſuch Port deſigned for, and to return a Certificate from the chief Officers of that Port where the ſame is deſigned for, and diſcharged within ſix Months from the date of the Cocquet.

XXII. But from the *Netherlands*, or *Germany*, there may not be imported any ſort of Wines (other than Rheniſh) Spicery, Grocery, Tobacco, Pot-aſhes, Pitch, Tar, Salt, Roſin, Deal-boards, hard Timber, Oil, or Olives, in any manner of Ships whatſoever.

It might not ſeem impertinent, that this latter part which is abridged, in reference to matters publick, ſhould be inſerted; for that ſometimes it may happen that an honeſt and well meaning Maſter or Skipper might innocently involve and hazard the loſs of his Ship by committing acts againſt Laws poſitive and prohibitory; and though Maſters and Mariners, *qua tales*, be not ſo exquiſite as to know all that does belong to their Duties, or at leaſt that

Q which

which the Law lays incumbent on their Shoulders; ye for that moſt of them have ſome ſmall glimmerings of th ſame, ſuch hints in matters publick as well as private may not only be of ſome advantage to them, but alſo to Merchants, who always upon the Miſcarriages of th Maſters, prove the greateſt Sufferers; the offenders, for the moſt part, proving not ſufficiently ſolvent.

CHAP. III.

Of Mariners, their ſeveral Offices and Immunities, and of Barretry committed by them.

I. *The ſeveral Marine Officers on Ship-board, and their Charges and Duties.*

II. *Of the Maſter's power and authority over them, as in relation to puniſhing or otherwiſe.*

III. *The Duty that* Mariners *owe to each other, and they to the Ship.*

IV. *Their attendance requiſite when laden; and if detriment, where to be reſponſible.*

V. *When Accidents befal them, where they ought to be look'd after, and at whoſe coſts.*

VI. *The Mariners Oath where requiſite to the diſcharging of the Maſter.*

VII. *What Accidents do deſtroy, and what not, their Wages.*

VIII. *Where they may join all in a Suit for the recovery of their Wages, and where not.*

IX. *Of their Wages where liable to anſwer damage.*

X. *Where they abſolutely loſe their Wages.*

XI. *Of Money or Goods taken up by a* Mariner, *where it ſhall be debt, and where a Diſcount of his Wages.*

XII. *And of their becoming liable to Correction.*

XIII. Barretry *in the* Mariners, *the reaſon why the Law imputes offences in them to be anſwered by the Maſter.*

XIV. *In what caſes the Maſter ſhall become liable for the Actions of his* Mariners.

XV. *Of Goods purloined before they are brought on Ship-board, where the Maſter is bound to anſwer, and where not.*

XVI. *Of the Antiquity of ſuch Cuſtom.*

XVII. *Of Goods brought ſecretly in on Ship-board, if purloined, where the Maſter is not made liable.*

XVIII. *Of Caution or fore-warning, where the ſame ſhall excuſe the Maſter.*

XIX. *Where the Maſter ſhall be liable, notwithſtanding ſuch Caution.*

I. THE

I. THE perſons ordinary for ſailing in Ships have divers denominations: The firſt, which is the Maſter, known to us and by moſt Nations both now and of old, and eſpecially by the *Roman* Laws, *Navicularius* or *Magiſter Navis*; in *Engliſh* render'd Maſter; or *Exercitor Navis*; in the *Teutonick* Skipper; by the *Grecians*, *Navarchus* or *Nauclerus*; by the *Italians*, *Patrono*. But this is only to thoſe Veſſels that are Ships of Burden and of Carriage; for to Ships of War the principal there is commonly called Commander or Captain. The next in order of Office to the Maſter, is he who directs the Ship in the Courſe of her Voyage, by the *French* called *Pilote*; by the *Engliſh* and *Flemming*, *Steerſman*; by the *Romans*, *Gubernator*; by the *Italians*, *Nochiero Pilotto* and *Navarchus*, as *Gerettus* writes. The third is eſteemed the Maſter's Mate or Companion, chiefly if the Maſter be Steerſman himſelf; of old by the *Græcians* and *Romans* called *Proreta*; his charge is to command all before the Maſt.

Leg. 1. & *paſſim ad Leg. Rhod.* & *lib.* 1. *parag.* 2. *Naut. Caup.*

Vid. Leg. Conſol.

His Succeſſor in order is the Carpenter or Shipwright, by thoſe two Nations of old, called *Naupegus* by the latter; by the firſt *Calaphates*. From the Loins of one of that Rank ſprang that great Emperor *Michael*, ſirnamed *Calaphates*, who denied not to own the quality of his Father among his Regal Titles. The very Name of *Calaphate* the *Venetian* and *Italian* ſtill uſe to this Day.

The next who ſucceeds in order, is he who bears the Charge of the Ship's Boat, by the *Italians* called *Brachierie*; by the *Græcians* and *Romans*, *Carabita*, from *Carabus*, which denotes the Boat of a Ship.

The Father was of *Phalagonia*, as *Egnatius Volateranus* obſerves, *lib.* 23.

The ſixth in order, eſpecially in Ships of Burden, is the Clerk or *Purſer*, by the *Italians* called *Scrivano*: whoſe Duty is the regiſtring and keeping the Accounts of all received in or delivered out of the Ship; for all other Goods that are not by him entred or taken into Charge, if they happen to be caſt over-board in a Storm, or are ſtoln or imbezzled, the Maſter anſwers them not, there being no Obligation on him by Law for the ſame; his Duty is to unlade by Day, not Night.

Ill Conſolato Stat. 14 *Car.* 2. *cap.* 11.

The ſeventh a moſt neceſſary Officer as long as there are aboard Bellies, ſharp Stomachs and Proviſion, called the *Cook*.

The eighth is the Ship's Boy, who keeps her continually in Harbours, called of old by the *Græcians*, *Nauphilakes*; by the *Italians*, *Guardino*: Theſe Perſons are diſtinct in Offices and Names, and are likewiſe diſtinguiſhed in their Hires and Wages; the reſt of the Crew are under the common Name of Mariners, by the *Romans* called *Nautæ*; but the *Tarpollians*, or thoſe Youths or Boys that are Apprentices, obliged to the moſt ſervile Duties in the Ship, were of old called *Meſonautæ*.

Budæus ad Leg. 1. *Naut. Caup. tot.*

By *Stat.* 2. *Ann. ch.* 6. Two Juſtices of Peace, or the Church-Wardens, *&c.* with Conſent of ſuch Juſtices, may bind out any Boy of ten Years of Age, who is or his Parents are chargeable to the Pariſh, or who begs for Alms, to be Apprentice to the Sea-Service to any Subject, Maſter of a Ship, belonging to any Port in *England*, *Wales*, or *Berwick*. See the Act how the Indenture is to be made, and for ſeveral other Particulars. The Church-Wardens are to pay 50 *s.* to buy neceſſary Clothing and Bedding: Such Apprentice is not to be impreſſed, or permitted to inliſt himſelf in the King's Service till eighteen Years of Age. But Note, that by *Stat.* 4. and 5. *Ann. ch.* 19. *Sect.* 16. Maſters are not obliged to take ſuch Apprentices under the Age of fifteen Years; nor, unleſs they be healthy and ſtrong of Body. The Admiralty is to grant Protections for Apprentices ſo bound, till eighteen Years of Age, without Fee. They may be aſſigned, with the Aſſent of two Juſtices; and then alſo to have Protections.

II. The Maſter hath the ſupreme Rule on ſhip-board, and by that Means his Power and Authority is by Law much countenanced, eſpecially in the keeping his Crew in Peace ſo long as they eat his Bread; and if a *Mariner* ſhall happen to be bruiſed or hurt in doing his Duty and Service, the Maſter * is to take Care that he be carefully look'd after, in order to the procuring his Recovery; and if it be occaſioned by the Miſcarriage of another on Ship-board, he may refund the Damage out of his Wages, but ſtill remembring who gave the firſt Aſſault.

* *Per Leg. Oleron, cap.* 6. *Per Leg. de exerc. act.* & *l. in fin Naut. Caup.*

If

If it happens that the Maſter commands his Boat to be manned out, and it ſo happens that the ſame is out of order, or unfit to take the Sea, the Tews, or other Accoutrements being impotent, if the *Mariners* happen to be drowned, the Maſter is to repay by the Law *Marine* one whole Year's Hire to the Heirs of the drowned: Therefore Maſters ought carefully to view and ſee that the Boat be fit for Men to truſt their Lives in, upon his Command.

If a *Mariner* ſhall commit a Fault, and the Maſter ſhall lift up the Towel three times before any *Mariner*, and he ſhall not ſubmit, the Maſter at the next Place of Land may diſcharge him; and if he refuſeth to go aſhore, he ſhall loſe half his Wages, and all his Goods within the Ship. If the *Mariner* ſhall ſubmit, and the Maſter will not receive the ſame, he ſhall have his whole Wages; or if the *Mariner* ſhall depart the Ship on the Maſter's Command, and the Maſter happens not to take another, if any Damage happens to Ship or Goods, the Maſter muſt anſwer. *Per Leg. Oleron, cap.* 14.

III. *Mariners* muſt help one another at the Sea and in Port; if any refuſe, upon the Oaths of his Fellows, he loſeth his Wages. None of the Crew muſt or ought to leave the Ship, without Leave of the Maſter, when ſhe comes to a Port, or rides at Anchor, but always conſtantly to wait upon her till they are diſcharged, or have leave, at leaſt half to be left on Ship-board. *Per Leg. Oleron, cap.* 13. & *per Leg. Denmarc.*

A *Mariner* may not carry out of the Ship above one Meal's Meat, but Drink not a drop; and when on Ship-board, ought not to be there arreſted for Debt, but only ſo much of his Wages in the Hands of the Maſter attached: Yet this is doubted, if it be not on a ſworn Debt, that is, a Judgment or Sentence, or a Penalty to the King. *Leg. nemo de Reg. jur.* & *Leg. plerumque de injus vos.*

They ought not to depart from on Ship-board when once admitted into their full Pay (which is always when they break Ground) without Licence of the Maſter; and before they may ſo do, they are to leave a ſufficient number to guard the Ship and Decks.

See the ſeveral Acts of the 7th and 8th *William* III. *Cap.* 21. Intituled an Act for the Increaſe and Encouragement of Seamen; and of the 8th and 9th of the ſame

 King,

King, *Cap.* 23. Intituled an Act for the further Increaſe and Encouragement of Seamen, for regiſtring of Seamen, and providing for their Widows and Children in ſuch manner as therein is mentioned, too large to be recited here.

By Stat. 9. *Ann. ch.* 21. the Regiſtring of Seamen is repealed.

IV. If the Ship breaks Ground, and is ſet ſail, if after ſhe arrives at her deſired Port, their full Pay continues till ſhe returns; nor may they in any wiſe depart from on Ship-board without Leave or Licence of the Maſter; if they do, and any Diſaſter happens, they muſt anſwer: Yet at ſuch Port if the Veſſel be well moored and anchored with two Cables, they may go without leave, yet ſo as they leave a ſufficient number behind to guard the Decks: But then their return muſt be in due Seaſon; for if they make longer ſtay, they muſt make Satisfaction.

Leg. Oleron, cap. 5.

V. If *Mariners* get drunk and wound one another, they are not to be cured at the Charge of the Maſter or Ship; for ſuch Accidents are not done in the Service of the Ship: But if any of the *Mariners* be any ways wounded, or do become ill in the Service of the Ship, he is to be provided for at the Charges of the Ship; and if he be ſo ill as not fit to travel, he is to be left aſhore, and Care to be taken that he hath all Accommodations of Humanity adminiſtred to him: And if the Ship is ready for a Departure, ſhe is not to ſtay for him; if he recover, he is to have his full Wages, deducting the Maſter's Charges which he laid out for him.

Leg. Oleron, cap. 1.

Leg. Oleron, cap. 11.

VI. In Caſe of Storm, if Goods are caſt over-board for lightning the Ship, the Oaths of the *Mariners*, ſwearing that it was done for the Preſervation of the Veſſel and the reſt of the Lading, ſhall diſcharge the Maſter.

So Goods damnified at Sea, are cleared by the Oath of the Maſter and *Mariners*, by the Laws of *Oleron*.

Leg. Oleron. cap. 13.

To aſſault the Maſter on Ship-Board, is a Crime that ſubjects the *Mariner*'s Hand to be cut off, unleſs he redeems it at 5 *Solz*.

VII. If a Ship happens to be ſeized on for Debt, or otherwiſe to become forfeited, the *Mariners* muſt receive their Wages, unleſs in ſome Caſes where their Wages are forfeited

Conſolat. del mere.

forfeited as well as the Ship; or if they have Letters of Marque, and inſtead of that they commit Piracy, by reaſon of which there becomes a forfeiture of all: but Lading of prohibited Goods aboard a Ship, as Wool, and the like, though it ſubjects the Veſſel to a Forfeiture, yet it diſables not the *Mariner* of his Wages; for the *Mariners* having honeſtly perform'd their Parts, the Ship is tacitly obliged for their Wages: But if the Ship periſhes at Sea, they loſe their Wages, and the Owners their Freight. And this being the Marine Cuſtom, is allowed by the *Common Law* as well as the *Civil Law*. *Rolls's* Abridg. *fol.* 530.

If ſhe comes to her firſt delivering Port they have Wages till then: If loſt afterwards, they only loſe thoſe ſubſequent Wages. L. *Raym.* 639. Q. this, and ſee L. *Raym.* 739. where they loſt part of their firſt Wages.

VIII. The Courts at *Weſtminſter* have been very favourable to *Mariners* in order to the ſuing for Wages, for at the *Common Law* they cannot join, but muſt ſue all diſtinct and apart for their Wages.

Yet in the Admiralty they may all join, and the Courts at *Weſtminſter* will not grant a Prohibition: And ſo it was rul'd where one *Jones* † a Maſter of a Ship was ſentenced in the Admiralty for Wages at the Suit of poor *Mariners*, a Prohibition being prayed upon a Suggeſtion that the Contract was made at Land, and not *ſuper altum mare*; the Court denied it, for that he came too late, Sentence being given below againſt him: Yet if the *Mariners* had only libelled, and there had been no Sentence, and the Defendant had prayed a Prohibition, as above, the Court would have denied it. This hath been, and is uſually done. 1 *Vent.* 146. 343. 2 *Vent.* 181. 2 *Keeble* 779. † *Winch.* Rep. 8.

It was by meer Indulgence that Mariners were permitted to ſue in the Admiralty for their Wages: And this Indulgence was, becauſe the Remedy in the Admiralty was the eaſier and better; eaſier, becauſe they muſt ſever here, whereas they may join there; and better, becauſe the Ship itſelf is anſwerable: but it is expreſsly againſt the Statute, tho' now *Communis Error facit Jus.* The firſt inſtance of it is in *Winch.* 8. Yet it was never allowed the Maſter ſhould ſue there; nor is it reaſonable where he commenceth the Voyage as Maſter; for tho' the Mariners contract upon the Credit of *Salk.* 33. *pl.* 4.

the Ship, the Maſter doth contract on the Credit of the Owners. L. *Raym.* 397, *ad idem*.

Salk. 33. *pl.* 5. But yet the Mate may ſue in the Admiralty for his Wages, becauſe he Contracts with the Maſter, as the reſt of the Mariners do. L. *Raym.* 632, *ad idem*.

But the Court will be very well informed, that the Libel is for *Mariners* Wages; for ſome who work Carpenters work, and ſuch like Labour, aboard a Ship in a Haven or Port within the Realm, which is *infra Corpus Comitatûs*, (notwithſtanding thoſe great and ingenious Objections againſt it) and muſt be tried by the *Common Law*, and not elſewhere, will libel under that Cloak for *Mariners* Wages. But the Court in that caſe will grant a Prohibition. And ſo it was done in the like Caſes.

Sitwell & al. Owners of a Ship, *verſ. Love & al. Mich.* 27 *Car. in B. R.*

But if a Ship rides at Anchor in the Sea, and the Maſter ſends his Boat aſhore for Victuals or other Proviſions for the Ship, and accordingly the *Providore* or Slop-ſeller does bring Victuals and Proviſions aboard; in that Caſe if the Contract be made there, it muſt be ſued for in the Admiralty: But if the Goods are by the Purſer or *Mariners* contracted for at Land, they muſt ſue at *Common Law*.

Latch. fol. 11.

But a Suit in the Admiralty for Seamens Wages grown due in the River, though no Voyage made, was not prohibited. L. *Raym.* 1044.

Nor tho' made by Writing at Land; or even by Deed. (*Q.* of this laſt Point.) L. *Raym.* 1206.

The Maſter cannot ſue in the Admiralty for his Wages. L. *Raym.* 576.

This Doctrine cited. L. *Raym.* 650.

IX. If Goods are ſo imbezzled, or ſo damnified that the Ship's Crew muſt anſwer, the Owners and Maſter muſt deduct the ſame out of their Freight to the Merchants, and the Maſter out of the Wages of the *Mariners*; for though Freight is the Mother of Wages, ſo is it the very Father of Damage; For before the *Mariner* can claim his Wages out of what the Ship hath earn'd, the Ship muſt be acquitted from the Damage that the Merchant hath ſuſtained by the Negligence or Fault of the *Mariners*: And the reaſon is, for that as the Goods are obliged to anſwer the Freight, ſo the Freight and Ship is tacitly obliged to clear the Damage; which being done, the *Mariners* are then let in to their Wages.

Leg. Oleron.

X. If

X. If a Mariner be hired, and he deſerts the Service before the Voyage ended, by the *Law Marine* he loſes his Wages: And the ſame Cuſtom at *Common Law* pleaded, it hath been conceived will bar him.

If a *Mariner* ſhall commit any wilful or negligent Fault, by reaſon of which the Maſter, Owners, or the Ship anſwers Damage to the Merchant, an Action lies well againſt him.

In a Suit for Mariners Wages 'twas agreed, That if the Ship do not return, but periſhes by Tempeſt, Enemy, Fire, &c. the Mariners ſhall loſe their Wages; for if the Mariners ſhall have their Wages in theſe Caſes, they will not uſe their beſt Endeavours, nor hazard their Lives to preſerve the Ship, 1 *Sid.* 179. But if the Ship unlade, they ſhall have their Wages; in the Caſe of *Cullen* and *Mico*, 1 *Keeble* 831. 1 *Sid.* 236.

If a Seaman be preſſed, he ſhall have his Wages *pro ratâ.* L. *Raym.* 1211.

XI. If a *Mariner* takes up Monies or Cloaths, and the ſame is entered in the Purſer's Book, by the Cuſtom *Marine* it is a Diſcount or a Receipt of ſo much of their Wages as the ſame amounts to; and in an Action brought by them for their Wages, the ſame ſhall be allowed, and is not accounted mutual, the one to bring his Action for the Cloaths, and the other for his Wages.

XII. A Maſter of a Ship may give moderate and due Correction to his *Mariners*, and if they bring an Action againſt him, he may juſtify the ſame at the *Common Law*; and by the Law of *Oleron*, if a *Mariner* ſhall aſſault the Maſter, he is to pay 5 *Solz*, or loſe his Hand. *Paſch.* 27 *Car. in B.R. Pidgeon ad ſect. Argee per* L. C. J. *Hale. Leg. Oleron. c.* 13.

Mariners after they have unladen the Ship, if they demand their Wages, and there be any Intention of their Departure, the Maſter may detain a reaſonable Proportion of the ſame till they bring back the Ship, or give Caution to ſerve out the whole Voyage. *Per Leg. Oleron. cap.* 18.

XIII. *Barretry* of the *Mariners* is a Diſeaſe ſo Epidemical on Ship-board, that it is very rare for a Maſter be his Induſtry never ſo great, to prevent it; a Span of Villany on Ship-board ſoon ſpreads out to a Cloud, for no other Cauſe but of that circular Encouragement that one knaviſh *Mariner* gives another.

However the Law does in ſuch Caſes impute *Offences* and *Faults* committed by them to be *Negligences* in the *Juſt. de ob. quæ ex dilict. §. Fin.*

Maſter;

Maſter; and were it otherwiſe, the Merchant would be in a very dangerous Condition.

Paſch. 11. *Jac. in B. R. Hern verſus Smith.* Rolls Abridg. 533.

The Reaſons why they ought to be Reſponſible, are, for that the *Mariners* are of his own chuſing, and under his Correction and Government, and know no other Superiour on Ship-board but himſelf; and if they are Faulty, he may correct and puniſh them, and juſtify the ſame by Law: And likewiſe if the Fact is apparently proved againſt them, may reimburſe himſelf out of their Wages.

Naut. Caup. Stab. Leg. 1. §. 3, 6, & 7. 1 *Ven.* 190, 238. *Raym.* 220. 1 *Mod.* 85. 2 *Lev.* 69. *Gloſſ. ſuper eod. Sect. verb.* & *factum.*

XIV. And therefore in all Caſes, whereſoever the Merchant loads aboard any Goods or Merchandize, if they be Loſt, Imbezzled, or any other ways Damnified, he muſt be Reſponſible for them; for the very lading them aboard makes them liable, and that as well by the *Common Law* as the *Law Marine.*

XV. Nay, if his *Mariners* go with the Ship-Boat to the Key or Wharf to fetch Goods on Ship-board, if once they have taken Charge of them, the Maſter becomes immediately Reſponſible, if they Steal, Loſe, Damnify or Imbezzle them.

XVI. The antienteſt Record that is found extant, is that in *Edward* the Third's time, where one brought an Action of Treſpaſs againſt the Maſter for the Imbezlement by his *Mariners* of twenty two Pieces of Gold, Bow, Sheaf of Arrows, Sword, and other things; and adjudged he ſhould anſwer. And for that the ſame is or may be of great Moment, accept of a Tranſcipt of the Record, as the ſame was certified into *Chancery*, in order to have it ſent into the *King's Bench*, to enable the Plaintiff to bring an Action upon the ſame judgment in any Place in *England*, where he could meet with the Defendant.

Brevia Regis in Turre London. Trin. Anno 24 *E.* 3. *n.* 45. *Briſtol.*

Venerabili in Chriſto Patri Domino J. Dei gratia Wygorn' Epiſcopo Domini Regis Ed. Cancellario vel ejus locum tenenti ſui humiles & devoti, Robertus Gyene, Major Ville Briſtol, Edwardus Blankeit, & Johannes de Caſtle-acre Ballivi libertatum ejuſdem Ville, ſalutem cum omni reverentia & honore. De tenore & Recordi & proceſſus loquele que fuit coram nobis in Cur' Domini Regis

Regis ibidem ſine brevi inter Hen. Pilk & Jurdanum Tenore Magiſtrum Navis vocat la Graſiane de Bayone in pl'ito tranſgreſs' prout per breve Domini Regis nobis directum fuit vobis inde certificatur, ſub ſigillis noſtris vobis ſi placet mittimus in his ſcriptis. Ad placit' Tolls tent' ibidem die Martis prox' poſt Feſtum Epiphaniæ Domini anno Regni Regis nunc 24 Hen. Pilk quer' opt' ſe verſus Jurdanum Tenore Magiſtrum Navis vocat' la Graciane de Bayone de pl'ito tranſgreſs' per' pl' &c. & unde quer', quod ſecundum legem & conſuetudinem de OLERON unuſquiſq; Magiſter Navis tenetur reſpondere de quacunque tranſgreſs' per ſervientes ſuos in eadem fact', & Johannes de Rule & Warcolet de Bornes ſervientes prædicti Jurdani Magiſtri Navis prædicte die Mercur. prox' ante Feſtum omnium Sanctorum Anno Regni prædicti Regis Ed. 23. in Mari juxta Britan. in eadem navi de Johanne de Cornub' ſervient' predict' 22 libr' in auro, arcus, ſagit', glad. & al' bona & catalla ad valenc'. 40 l. ceperunt & aſportaverunt injuſte, &c. ad dampnum prædict' Hen. 60 l' & ſi predictus Jurdanus hoc velit dedicere, prædict Hen. paratus eſt verificare, &c. Et prædictus Jurdanus venit & dicit quod lex de Oleron talis eſt quod ſi aliquâ bona & catalla Magiſtro alicujus Navis liberata ſunt cuſtodiend', unde idem Magiſter pro eiſdem vel pro aliqua alia re in eadem navi facta manucap', illo modo Magiſter Navis tenetur reſpondere; non alio modo, & ſup' hoc petit Judicium. Et prædict Hen. dicit, quod unuſquiſque Magiſter tenetur reſpondere de quacunque tranſgreſſione per ſervientes ſuos in Navi ſua fact', & petit Judicium ſimiliter. Et ſup' hoc prædict' partes habent diem hic die Sabbati prox' poſt Feſtum ſci. Hillarii prox' futur' ad audiend' Judicium ſuum, &c. Ad quem diem prædicte partes venerunt & petierunt Judicium ſuum, &c. Et recitat Recordo & proceſſu prædictis in plena Curia coram Majore & Ballivis & aliis probis hominibus Ville & Magiſtris & Marinariis, viſum fuit Curiee, quod unuſquiſq; Magiſter Navis tenetur reſpondere de quacunque tranſgreſſione per ſervientes ſuos in Navi ſua facta. Ideo

conſideratum

The Judgment in this Caſe is according to Law, and ought not to have been a *capiatur*; for it is not ſuch a Treſpaſs as the King is entitled to a Fine *Vide Cro. Jac.* 224. *Beedle verſus Moris.* *Coke's* Entries, *fol.* 347.

conſideratum eſt, quod predict' Hen. recuperet dampna ſua 40 l. verſus predict' Jurdanum per Cur. taxat' & nihilominus idem Jurdanus tranſgreſſione predicta in miſericordia.

Leg 1. *in fin. Naut. Caup. per leg. itaque de furtis.*

XVII. The Maſter ſubject to anſwer Damage, is to be underſtood in all ſuch Caſes where the Lading was brought aboard either by his Conſent or his Purſer's; for any other, or ſuch as ſhall be ſecretly brought in, not being entered in the Purſer's Book, or in the Bills of Lading, the Maſter is not obliged to ſee forth-coming, unleſs it be ſuch Goods as the Parties bring into the Ship about them, as Clothes, Money, and the like, as above, thoſe things being ſeldom entered, yet moſt commonly thoſe that are viſible, the Maſter by Law is Reſponſible for.

Eod. Leg. in fin. Naut. Caup. & per leg. itaque de eod. edict. Bart. & Jaſon in leg. non ſolum. §. mortem de non oper.

XVIII. So likewiſe if a Maſter forewarn a Paſſenger to keep his Goods; and that he will no ways take Care of them, and if they be loſt or purloyn'd by the Crew, he will not be obliged to ſee them forth-coming; the Maſter is not there held Reſponſible in Caſe of a Loſs, eſpecially if there be any thing of Agreement thereunto.

XIX. But if Goods ſhall be ſent aboard a Ship, and the Maſter ſhall appoint a Cabbin for the ſame, and deliver the Key to the Lader, and tell him he will not be Reſponſible if a Loſs happens; yet if the Goods are ſtole, he muſt notwithſtanding make Satisfaction: By the *Common Law* it ſhall bind an Inn-keeper. *Mo.* 78.

8 *Coke* 33. *a. Mo.* 158. *Salk.* 18.

But if the Inn-keeper deſires his Gueſt to put his Goods in ſuch a Chamber under Lock and Key, *&c.* and then he will warrant, otherwiſe not, and the Gueſt leaves them in an outer Court, where they are ſtole, *&c.* the Inn-keeper ſhall not be charged.

Mich. 27 *Car.* 2. *per* Lord Chief Juſtice *Hale.*

Note, That Goods once delivered to a Maſter, the Cargo is not ſubject to be attached in his Hands, nor can any Cuſtom whatſoever ſupport the ſame; for they are in Law as it were bailed to the Ship, until the Freight and all other Charges are paid: And very much doubted whether an Attachment can be made in *London* of any Goods

Goods at all lying on Ship-board in the River of *Thames*, (which, though the Port of *London*) notwithſtanding Freight and all other Charges are paid off.

Commiſſioners of Bankrupt iſſued a Warrant to ſeize Goods of the Bankrupt on board two Ships in *Topſham Bay* in *Devonſhire*; the Goods were conſign'd to Perſons in *Holland* who had not paid the Bankrupt for them: The Maſters refuſed to deliver the Goods, notwithſtanding the Warrant; which occaſioned the Commiſſioners coming to demand the Goods, which ſtill were refuſed. *Hill.* 8 *Annæ in Chancery.*

Sir *Peter King* moved for an Order upon the Maſters for their Contempt.

The Court at firſt greatly doubted whether they can make an Order in Aid and Aſſiſtance of the Warrant of the Commiſſioners of Bankrupt, the Statute having veſted a large Power in them; beſides the Perſons to whom the Goods are conſigned, would be indebted to the Creditors of the Bankrupt, which Creditors may recover by the Law of *Holland*.

Sir *Peter King*. We ſhall rather loſe the Goods, than follow them into *Holland*.

Lord Chancellor. Their refuſing to deliver the Goods upon the Warrant, is no Contempt to this Court, tho' the Commiſſioners act under a Commiſſion under the Broad Seal. I remember the Queen was applied to, to lay an Embargo upon a Ship in the like Caſe, but denyed; becauſe an Embargo would have affected other Goods in the Ship: The Maſters in this preſent Caſe have ſome Colour to detain the Goods; for upon a Delivery of them, they may be diſappointed of Freight, and the Aſſignees of the Commiſſion muſt ſtand in the ſame Place as the Bankrupt, and be ſubject to his Contract.

But however, an Order was made upon the Maſters to deliver the Goods upon payment of the Freight Money, and the Maſters to be indemnified by the Creditors, againſt a Bill of Lading, which was ſent to the Conſignees.

CHAP. IV.

Of Freight, Charter-parties, and Demorage.

I. *The various ways that Ships may be freighted at this Day.*
II. *The antient way of Freighting.*
III. *How the ſame is governed upon the various Contracts, and of Accidents happening to Maſters or Laders preventing the Voyage.*
IV. *Of Agreements parol and in Writing, how confirmed by the Common Law; what it is.*
V. *Of Ships laded and unladed before the Voyage begun; their becoming diſabled,* viz. *periſh in the Voyage before the ſame is compleated.*
VI. *Of Ships departure conſidered in reference to Freight and Damage.*
VII. *Of Freight ariſing on Trading Voyages, and loſt by contingent Actions, conſidered by the Common Law, and the Law Marine.*
VIII. *Of Freight becoming due upon the various ways of Contract, or general where none was agreed for.*
IX. *Of Faults ariſing from the Freighters; and of the Deceaſe of the Ship in reference to Freight.*
X. *Faults of Maſters ariſing from taking in Goods more than were contracted for; and of being forced into Ports in his Paſſage.*
XI. *Paſſengers dying, the Ship's Title to their Goods and Concerns.*
XII. *The Ship in conſtruction of Law how far liable to Freight.*
XIII. *Ships taken and retaken in War, whether the ſame deſtroys the Contract.*
XIV. *Goods become loſt without Fault of the Ship, whether Freight becomes due.*
XV. *Of Freight contracted with Perſons deficient.*
XVI. *Of Ships contracted for by the Month, to be paid at the Arrival at a Port; Ship is caſt away, the Goods ſaved: Whether the Freight ought to be paid.*
XVII. *Covenant mutual in a Charter-Party, ſhall not be pleaded the one againſt the other. Plea that anſwers to Part only is ill. Covenant therein by ſeveral, yet brought againſt one only. Covenant by ſeveral &* quemlibet eorum, *may be brought againſt one only.*

I. IN the *Freighting* of Ships, reſpect is always had to the Ship itſelf, or elſe to a certain Part thereof.

Again, the Merchants either Freight her by the *Month*, or the *entire* Voyage, or by the *Tun*; for it is one thing to Freight a Ship, and another thing to take certain *Tunnage* to Freight.

So

So alſo it is one thing to be a Cape-Merchant, another to be an under Freighter.

II. There was of old another way of Freighting, which was when the Merchant agreed with the Maſter for a Sum certain to convey his Goods enſured againſt all Peril; ſuch were to be reſponſible if any Detriment or Loſs happened; but that is now become obſolete. 21 *E.* 3. *Cotton*'s Abridgment of the Parliament Records, *fol.* 63.

III. *Freight* is governed generally by the Contract, and varies according to the Agreement, reduced generally into a Writing commonly called a *Charter-party*, executed between the Owners and Merchant, or the Maſter in the behalf of himſelf and Owners, or himſelf and the Merchant, or between them all; or elſe is Parol. *Naut. caup. Stab. &c. Leg.* 1. §. *quancunque vim. Si quis navem conduxerit, inſtrumenta conſignata ſunto. Pekieus com. ad Leg. Rhod. Art.* 20.

The Maſter or Owners generally covenant to provide a *Pilot* and all other Officers and *Mariners*, and all other things neceſſary for the Voyage; and for the taking in and delivering out of the Lading.

If there be an Agreement and *Earneſt*, but no Writing, if the ſame be broke off by the Merchant, he loſeth his *Earneſt*; but if the Owners or Maſter repent, they loſe double the *Earneſt*. *Per Leg. Naval. Rhod. Art.* 19.

But by the *Common Law* of *England*, the Party damnified may bring his Action of the Caſe, and recover all Damages on the Agreement. *Cro. Car.* 383.

If a time be appointed by the *Charter-party*, and either the Ship is not ready to take in, or the Merchant not ready to lade aboard, the Parties are at Liberty, and the Party Damnified hath his Remedy againſt the other by Action, to recompence the Detriment. *Per Leg. item* §. *Si in Leg. loca.*

If Part of the Lading be on Ship-board, and it happens ſome Misfortune may overtake the Merchant that he hath not his full Lading aboard at the time, the Maſter is at liberty to contract with another, and ſhall have Freight by way of Damage for the time that thoſe Goods were aboard after the time limited; for ſuch Agreements being of a Conditional nature Precedent, a Failure as to a compleat Lading, will determine the ſame, unleſs afterwards *affirmed by Conſent*. And though it be no Prudence for every Merchant or every Maſter to depart from the Contract, if it ſhould ſo fall out that the Agreement as to the Lading is not performed according to Promiſe, (ſeldom or ever done if any Part be aboard) yet it is the higheſt

higheſt Juſtice, that Ships and Maſters ſhould not be Infettered, but Free: for otherwiſe by the bare lading of a Caſk or Bale, they might be defeated of the Opportunity of Paſſage or Seaſon of the Year.

Cro. Car. 383. 3 *Levinz* 283. *Per Leg. ſi ex conduct.* & *Leg. ſi item fundus* & *Leg. hæc diſtinctio. Per Leg. Oleron. cap.* 21.

So on the other hand, if the Veſſel is not ready, the Merchant may ſhip aboard in another Veſſel the Remainder of his Goods, and diſcharge the firſt Skipper, and recover Damages againſt the Maſter or Owners for the reſt. This is grounded upon the like Reaſon as the former.

And therefore by the *Law Marine*, Chance, or ſome other notorious Neceſſity, will excuſe the *Maſter*; but then he loſeth his Freight till ſuch time as he *breaks ground*, and till then he ſuſtains the Loſs of the Ship.

Art. 25. *Legem Naval. Art.* 29. *eod.* (*a*) 1 *Mod.* 85. *Raym.* 220. 1 *Ven.* 190, 238. 2 *Keb.* 866. 3 *Keb.* 72, 112, 135.

But if the Fault be in the Merchant, he then muſt anſwer the Maſter and the Ship's Damage, or elſe be liable to entertain the Ship's *Crew* ten Days at his own Charge; but if after that, then the full Freight: And if any Damage happens afterwards, the Merchant muſt run the Riſque of that, and not the Maſter or Owners. (*a*) But by the *Common Law*, ſo long as the Maſter hath the Goods on Ship-board, he muſt ſee them forth-coming.

IV. *Charter-parties* have always, by the *Common Law*, had a genuine Conſtruction as near as may be, and according to the Intention and Deſign, and not according to the literal Senſe of Traders, or thoſe that Merchandize by Sea, yet they muſt be regularly pleaded; and therefore in an Action of Covenant on an Indenture dated 9 *Oct.* 38 *El.* wherein was recited, Whereas by Indenture of *Charter-party* dated *Sep.* 8. 38 *Eliz.* between the Plantiff and *Francis Cherry*; the Plaintiff having hired of him a Ship, for a Voyage to *Dantzick*, upon taking the Ship it was agreed between them, that the Ship ſhould be laden with Corn at *Dantzick*, and to ſail to *Leghorn*. Now by the ſaid Indenture, in Conſideration the Plaintiff had agreed, that the Defendant ſhould have the Moiety of Corn, *quod tunc fuit*, or afterwards ſhould be laden in the Ship during the ſaid Voyage, the Defendant covenanted to pay the Moiety of the Money for the ſaid Corn, *quod tunc fuit*, or afterwards ſhould be laden, &c. and alledgeth *in facto*, that *Oct.* 9. 38 *Eliz.* the Ship was laden with 60 Laſts of Corn, and for not Performance of this Covenant

the

the Action was brought; the Defendant pleaded that the Deed was ſealed and delivered *Oct.* 28. 38 *Eliz.* & *quod ad tunc vel poſtea* there was not any Corn laden there, and traverſeth the Delivery *Oct.* 9. or at any Time afterwards before the 28 *Oct.* 38 *Eliz.* And it was adjudged upon Demurrer, That in regard the Plaintiff declared upon a Deed dated *Oct.* 9. 38 *Eliz.* it ſhall be intended to have its Eſſence and Delivery at that time, and no other; and if he ſhould confeſs it to be delivered at any other time, it would be a Departure from his Declaration, and the Word *tunc* is referred to the Delivery, and not to the Date; and if it were Delivered ten Months after the Date, he ſhould not have the Benefit of the Corn laden before the delivery: And therefore the Defendant was adjudged not to be charged with paying for any Corn before the Delivery of the Deed, the Words of the Deed being, that he ſhould pay for the Corn then laden, &c. which (*then*) is referred to the time of the Eſſence of the Deed by the Delivery, and not to the Date. 2 *Cro.* 263. *Oſley v.* Sir *Baptiſt Hicks.*

Atkinſon did contract with *Buckle* for the Carriage of 100 Quarters of Barley, and did promiſe to deliver unto him the 100 Quarters of Barley, a Ship-board at *Barton* Haven, in the County of *York*, to carry them for him, and for the Carriage thereof did promiſe to pay to him ſo much; and *Buckle* promiſed to carry the ſame for him, and accordingly brought his Ship to the ſaid Haven, expecting there the Delivery of the 100 Quarters of Barley; but *Atkinſon* came not to deliver the ſame to him, whereupon *Buckle* brought his Action of the Caſe upon the Promiſe, and upon *non aſſumpſit* pleaded had a Verdict and Judgment, which was affirmed upon a Writ of Error. 3 *Bulſt.* 152. 1 *Ro.* 312.

Charter-Party (*Charta partita*, i. e. a Deed or Writing divided) is all one in the Civil Law, with an Indenture at the Common Law. It ſettles the Agreement and Bills of Lading, the Contents of the Cargo, and binds the Maſter to deliver them well conditioned at the place of diſcharge, according to the Contents of the Charter-Party or Agreement; and for Performance, the Maſter obliges Himſelf, Ship, Tackle, and Furniture, to ſee the ſame done and performed.

R Covenant

Covenant *inter A.* of the one Part, and *B.* and *C.* on the other, *&* *quemlibet eorum*, and the Action brought againſt one only, and well.

Covenant upon a Charter Party between *Bolton* Owner, and *Lee* and *Morgan* Merchants, Freighters of a Ship, by which *Bolton* put to Freight the Ship in a Voyage to *Guinea* at 48 *l. per Menſem*, and there was a mutual Covenant between the Parties *& quemlibet eorum modo ſequente*, and then divers Covenants follow concerning the Ship's Tackle and Performance of the Voyage; and then a Covenant for the Payment of the Freight (*viz.*) when the Ship arrived at *Guinea*, the Freight then due was upon Notice to be paid in *England*, and when ſhe arrived in *England* the Reſidue from the time of the laſt Payment was to be paid. And ſaith that at ſuch a time the Ship arrived, and that 6 Months and 10 Days were then paſt, which came to ſo much, whereof Notice was given; and that after ſuch a time the Ship arrived at *England*, and that the Freight for 6 Months, from the time of the laſt Payment, and the Freight came to 287 *l.* 4 *s.* and that the Defendant had not paid any of the Sums, upon which the Defendant demurred. And took theſe Exceptions to the Declaration:

1 *Mod. Caſ.* 154. *Salk.* 393. *pl.* 2.

1. For this that the Action is brought againſt one of the Defendants only, omitting the other; *ſed non allocatur*, the Covenant being between them *& quemlibet eorum* is joynt and ſeveral of every Part.

2. For that it appears upon Computation, the Plaintiff demanded more upon the firſt Breach than is due by 30 *s.* and leſs than is due upon the ſecond by 16 *s.* and tho' that the firſt may be cured by the Jurors finding leſs, or by the Plaintiff's releaſing the Overplus, yet where he demands leſs than his due, it is incurable; and cited ſeveral Books there quoted for that purpoſe in Aſſumpſit, where, as in this Caſe, only Damages are to be recovered; and on the other Part was cited, *Cro. Jac.* 498. *Pemberton v. Shelton*, *&* 529. *Parker v. Curſon & uxor*, ſee 2 *Levinz* 4. *Hulme & Sambers*, *&* 2 *Vent.* 129. *Welby & Philips*. *Hale* Chief Juſtice took a Difference between this Caſe of Covenant, and Debt, and held that after Verdict it had been cured without queſtion, but upon Demurrer there may be ſome Doubt, the Demurrer being general, but had the Demurrer been ſpecial it had been ill, and ruled Judgment, *pro Quer.* 2 *Levinz* 56. *&* 3 *Keble* 39. *&* 50. *Bolton* and *Lee*.

V. If

V. If Goods are fully laded aboard, and the Ship hath *broke Ground*, the Merchant on Conſideration afterwards reſolves not on the *Adventure*, but will unlade again; by the *Law Marine* the Freight is due. *Ad Leg. Rhod.*

And if the Ship in her Voyage becomes *unable* without the Maſter's Fault, or that the Maſter or Ship be arreſted by ſome Prince or State in her Voyage, the Maſter may either *mend his Ship, or Freight another*. *Judg. Oleron. Leg. ult. ad Rhod.*

But if the Merchant will not agree to the ſame, then the *Freight* becomes due for ſo much as the Ship hath *earned*; for otherwiſe the Maſter is liable for all Damages that ſhall happen. And therefore if that Ship, to which the Goods were tranſlated, periſhed, the Maſter ſhall anſwer; but if both the Ships periſh, then he is diſcharged. *Digeſt. Paulus. l. 14. c. 2. §. 10.*

But if there be extream Neceſſity, as that the Ship is in a ſinking Condition, and an empty Ship is paſſing by, or at hand, he may tranſlate the Goods; and if that Ship ſink or periſhes, he is there excuſed: But then it muſt be apparent that that Ship ſeemed *probable* and *ſufficient*.

VI. If a ſet time be fixed and agreed upon between the Merchant and the Maſter, wherein to begin and finiſh his Voyage, it may not be altered by the *Supra Cargo*, without ſpecial Commiſſion for that Purpoſe. *Leg. qui Romæ §. Callimachus, ff. de verb. obl.*

If a Maſter ſhall weigh Anchor, and ſtand out to his Voyage after the time covenanted or agreed on for his Departure, if any Damage happens at Sea after that time, he ſhall refund and make good all ſuch Misfortune; Yet if a *Charter-party* is made, that the Plaintiff ſhall ſail from *London* to *Liſbon* with the firſt Wind and Opportunity, &c. in Conſideration of which the Merchant did covenant to pay ſo much for Freight; the Ship departs not with the firſt Wind and Opportunity, yet afterwards *breaks Ground*, and arrives at her Port, the Freight in this Caſe is become due; for there is nothing can bar the Ship of her Freight but the not Departure, for only that in Law is traverſable, being material to avoid the Payment of Freight; but to ſay the Ship did not depart with the next Wind, is but a Circumſtance which in ſtrictneſs of Law is not traverſable. *Popham. 161. Palm. 398. Latch. 12. 49.*

If it be agreed that the Maſter ſhall ſail from *London* to *Legborn* in two Months, and Freight accordingly is agreed *Angl Alex. & Jaſon in dict. §. Callimachus.*

on, if he begins the Voyage within the two Months, tho' he does not arrive at *Legborn* within the time, yet the Freight is become due.

2 Vern. 210.

Where the *Eaſt-India Company* by Charter-Party might keep the Ship a long time in *India*, and did ſo keep her until ſhe was unfit for Service, and could not come home; they were obliged in *Chancery* to pay the Damage; tho' by the peruſing of the Charter-Party it was payable at the Return of the Ship.

2 Vern. 212.

So where no Freight was to be paid for the Cargo outwards but freight for the Cargo homewards; and the Factor abroad had no Goods to load her homewards Payment of the Freight was decreed.

2 Vern. 727.

So though the Officers and Mariners gave Bond not to demand Wages unleſs the Ship returned to *London*; ſhe arrived at a delivering Port, and afterwards was taken by the Enemy. They had their Wages to the delivering Port.

Leg. Relegati ff. de pœnis & Leg. ult. de Sep. vio.

VII. If the Ship is freighted from one Port to another Port, and thence to a third, fourth, and ſo home to the Port from whence ſhe firſt ſailed, (commonly called a *Trading Voyage*) this is all but one and the ſame Voyage, ſo as it be in Conformity to the *Charter-party*.

Trin. 9. Jac. in C. B. Rot. 638. *Bright verſus Cooper*, 1 *Brownl.* 21.

A Merchant agrees with a Maſter, that if he carries his Goods to ſuch a Port, he will then pay him ſuch a Sum; in the Voyage the Ship is aſſaulted, entred and robbed by Pirates, and part of her Lading taken forth, and afterwards the Remainder is brought to the Port of diſcharge, yet the Sum agreed upon is not become due, for the Agreement is not by the Maſter performed.

1 *Co.* 97. *Shelley*'s Caſe. *Reginer* and *Fogaſſa*'s Caſe. *Plowden Com.* But a Pirate is not an Enemy. *Vide* Chap. *Piracy*.

But by the *Civil Law* this is *vis major* or *caſus fortuitus*, there being no Default in the Maſter or his Mariners, and the ſame is a Danger or Peril of the Sea, which if not in Naval Agreements expreſſed, yet is naturally implied: For moſt certain, had thoſe Goods, which the Pirates carried away in ſtreſs of Weather, *Navis levandæ cauſa*, been thrown over-board, the ſame would not have made a Diſability as to the Receipt of the Sum agreed on; for by both the *Common Law* and the *Law Marine*, the Act of God, or that of an Enemy, ſhall no ways work a Wrong in Actions private.

VIII. If

VIII. If a Ship be freighted by the Tun, and ſhe is full laden according to the *Charter-party*, the Freight is to be paid for the whole; otherwiſe but for ſo many Tun as the Lading amounted to.

If Freight be contracted for the lading of certain Cattle, or the like, from *Dublin* to *Weſt-Cheſter*, if ſome of them happen to die before the Ship's Arrival at *Weſt-Cheſter*, the whole Freight is become due as well for the dead as the living *.

Leg. ſi quis Cod. de juſtit. & ſubſtit.

But if the Freight be contracted for the tranſporting them, if Death happens, there ariſeth due no more Freight than only for ſuch as are living, at the Ship's Arrival at her Port of Diſcharge, and not for the Dead †.

* *Arg. Leg. ſcio ff. de ann. legat. & leg. illis libert. in fin. ff. de condit. & demon. Arg.* 7.

If the Cattle or Slaves are ſent aboard, and no agreement is made either for lading or tranſporting them, but generally, then Freight ſhall be paid as well for the Dead as the Living.

† *Leg. qui operas & Leg. ſi ædes* §. *cum quidam &* §. *fin. ff. locati*

If Freight be contracted for the tranſporting of Women, and they happen in the Voyage to be delivered of Children on Ship-board, no Freight becomes due for the Infants.

Leg. ſed & addes in §. *Si quis mulierem ff. locat.*

The *Charter-party* does ſettle the Agreement, and the Bills of Lading the Contents of the Cargo, and binds the Maſter to deliver them well conditioned at the Place of Diſcharge, according to the Contents of the *Charter-party* or Agreement; and for Performance, the Maſter obliges Himſelf, Ship, Tackle and Furniture to ſee the ſame done and performed.

There are 3 Bills of lading generally made, the one to be ſent over Sea to him whom the Goods are conſigned to, the other for the Maſter, and the laſt for the Merchant or Lader.

If Goods are ſent aboard, generally the Freight muſt be according to Freight for the like accuſtomed Voyages.

If a Ship ſhall be freighted and named to be of ſuch a Burden, and being freighted by the Tun, ſhall be found leſs, there ſhall no more be paid than only by the Tun for all ſuch Goods as were laded aboard.

If a Ship be freighted for two hundred Tuns or thereabouts, the addition of *thereabouts* is commonly reduced to be within five Tun, more or leſs, as the Moiety of the number *Ten*, whereof the whole number is compounded.

If a Ship be freighted by the great, and the Burden of it not expreſſed, yet the Sum certain is to be paid.

Chaſ & Jones verſ. Lovering. Styles 220.

Leg. penult. § 9. *F. de locat.*

IX. If the Ship, by reaſon of any Fault ariſing from the Freighter, as lading aboard prohibited or unlawful Commodities, occaſions a Detention, or otherwiſe impedes the Ship's Voyage, he ſhall anſwer the Freight contracted and agreed for.

Trin. 9. *Jac. B. R. Bright. verſ. Cowper, Brownlow,* 1 *part.* 21.

If a Ship be freighted *out* and *in*, there ariſes due for Freight, nothing, till the whole Voyage be performed: So that if the Ship die, or is caſt away coming home, the Freight outwards, as well as inwards becomes loſt.

13th *July*, 1680, in Chancery, a Part-Owner of a Ship ſued the other Owners, for his Share of the Freight of the Ship which finiſhed her Voyage; but the other Owners ſet her out, and the Complainant would not join with them in ſetting her out, or in the Charge thereof; whereupon the other Owners complained in the Admiralty; and by Order there, the other Owners gave Security, That if the Ship periſhed in the Voyage, to make good to the Plaintiff his Share, or to that effect; in ſuch a Caſe, by the Law Marine, and Courſe of the Admiralty, the Plaintiff was to have no Share of the Freight. It was referred to Sir *Lionel Jenkins* to certify the Courſe of the Admiralty, who certified accordingly, and that it was ſo in all places, for otherwiſe there would be no Navigation, whereupon the Plaintiff's Bill was diſmiſt. See more of Freight, and the Incidents thereunto, *Lex Mercatoria* 100.

Leg. Oleron: Leg. Naval. Rhod. Art. 25.

X. If a Maſter freights out his Ship, and afterwards ſecretly takes in other Goods unknown to the firſt Laders, by the Law *Marine* he loſes his Freight; and if it ſhould ſo fall out, that any of the Freighter's Goods ſhould for Safety of the Ship be caſt over-board, the reſt ſhall not become ſubject to the Average, but the Maſter muſt make good that out of his own Purſe: But if the Goods are brought into the Ship ſecretly againſt his Knowledge, it is otherwiſe; and Goods ſo brought in, the ſame may be ſubjected to what Freight the Maſter thinks fitting.

Conſol. del Mer.

If the Ship puts into any other Port than what ſhe was freighted to, the Maſter ſhall anſwer Damage to the Merchant; but if forced in by Storm, or by Enemy, or Pirates, he then muſt ſail to the Port conditioned at his own Coſts.

Leg. Oleron.

Generally

Generally the touching at ſeveral Ports by Agreement, imports not a Diverſity, but a Voyage entire. Rule.

XI. If Paſſengers having Goods, happen to die on Ship-board, the Maſter is to *inventory* their Concerns, and the ſame may keep a Year; and if none claim the ſame, the Maſter becomes Proprietor defeaſable: But the Bedding and Furniture of the Parties become the Maſter's and his Mates, and the Clothing are to be brought to the *Ship-Maſt-Head*, and there praiſed and diſtributed amongſt the *Crew*, as a reward for their Care of ſeeing the Body put into the Sea. *Leg. Conſolat. del Mere.*

The Captain died leaving Money on Board, the Mate became Captain, and improved the Money: He ſhall, on Allowance for his Care in the Management of it, account for the Profits, and not for the Intereſt only. 1 P. *Will.* 140.

XII. The Lading of the Ship in Conſtruction of Law, is *tacitly* obliged for the Freight, the ſame being, in Point of Payment, preferred before any other Debts to which the Goods ſo laden are liable, though ſuch Debts, as to time, were *precedent* to the Freight; for the Goods remain as it were bailed for the ſame: Nor can they be *attached* in the Maſter's Hands, though vulgarly it is conceived otherwiſe. *Bald. in leg. certi juris in* 4. *Q. in verb. Quid ergo Cod. locat.*

Ships deſerve *Wages* like unto a Labourer; and therefore in the Eye of the Law, the Actions touching the ſame, are generally conſtrued favourably for the Ship and her Owners: And therefore if four Part-Owners of five, ſhall make up their Accounts with the Freighters, and receive their Proportions, yet the fifth Man may ſue ſingly by himſelf without joining with the reſt; and this as well by the *Common Law* as the *Law Marine*. *Stanley verſus Ayles* by *Hale*, 3 *Keble* 444.

XIII. A Ship in her Voyage happens to be taken by an Enemy, afterwards in Battle is re-taken by another Ship in Amity, and Reſtitution is made, and ſhe proceeds on in her Voyage, the Contract is not determined, though the taking by the Enemy diveſted the Property out of the Owners; yet by the Law of War that Poſſeſſion was defeaſeable, and being recovered in Battle afterwards, the Owners became re-inveſted: So the Contract, by Fiction of Law, became as if ſhe never had been taken, and ſo the entire Freight becomes due. 7 *R.* 2. *Statham* Abridg. 54. *In Jure Poſtliminii leg. re-tor. & leg. in bello,* §. 1.

Covenant by a Charter-Party, that the Ship ſhall return within the River of *Thames* by a certain time (*periculis & caſualitatibus Marium*, *Anglicè*, Dangers of the Sea, *exceptis*) and after in the Voyage, and within the time of the return, the Ship was taken upon the Sea, *per homines bellicoſos modo guerrino arraiatos*, to the Covenantor unknown, *&c. & abinde huc uſque detenta fuit* by them, *per quod* he could not return within the River of *Thames* within the time mentioned in the Covenant. Reſolved this Impediment was within the Exception, for theſe Words intend as well any Danger upon the Sea by Pirates and Men of War, as Dangers of the Sea by Shipwreck, Tempeſt, or the like. *Pickering* and *Barkley*, *Stiles* 132. & 2 *Roll*'s Abridg. 248.

Boyce v. Cole, Hill. 26. 27 *Car.* 2. *B. R.*

XIV. If Freight be taken for 100 Tuns of Wine, and twenty of them leak out, ſo that there is not above eight Inches from the Buge upwards, yet the Freight becomes due: One Reaſon is, becauſe from that Gage the King becomes entitled to Cuſtom, but if they be under eight Inches, by ſome it is conceived to be then in the Election of the Freighters to fling them up to the Maſter for Freight, and the Merchant is diſcharged. But moſt conceive otherwiſe; for if all had leak'd out, (if there was no Fault in the Maſter) there is no Reaſon the Ship ſhould loſe her Freight; for the Freight ariſes from the Tunnage taken, and if the Leakage was occaſioned through Storm, the ſame perhaps may come into an Average. Beſides, in *Bourdeaux* the Maſter ſtows not the Goods, but the particular Officers appointed for that Purpoſe, *quod nota*. Perhaps a ſpecial Convention may alter the Caſe.

Moſt certain, if a Ship, freighted by the Great, be caſt away, the Freight vaniſhes; but if by the Tun or Pieces of Commodity, and ſhe happens to be caſt away, afterwards Part is ſaved; doubted whether *pro rata* ſhe ought not to be anſwered her Freight.

When ſuch Misfortune happens, the Inſured commonly transfer thoſe Goods over to the Aſſurors, who take them towards Satisfaction of what they pay by Virtue of their Subſcriptions.

Debt upon a Charter-Party upon a Penalty, the Covenant was to pay ſo much *per* Tun for Freight, and Breach was aſſigned in *non* Payment, for ſo many Tun and

and an Hogſhead, which came to ſo much: Upon Demurrer, 'twas held the Declaration was ill, for the Covenant is only to pay ſo much *per* Tun; *aliter* if it had been to pay *ſecundum ratam* of ſo much *per* Tun. *Roe* against *Barns*. 2 *Levinz* 124. 3 *Keble* 421. *Yelv.* 134.

XV. If a Merchant takes Freight by contracting with a Mariner that is not a Maſter, if Loſs happens, he muſt be contented to ſit down without any Remedy againſt the Owners; but perhaps ſuch a Mariner for ſuch an Act may ſubject himſelf to an Action.

But if there be a Fault commited by a Mariner which was hired, or put in by the Maſter or Owners; there for Reparation the Owners become liable. 4 *Inſt.* 146.

XVI. The Maſter is not bound to anſwer Freight to the Owners for Paſſengers, if they are found to be unable to pay. *Johannes Locinius, l.* 3. *c.* 8.

If Ship by *Charter-party* reciting to be of the burden of 200 Tuns is taken to Freight for a Sum certain, to be paid at her return, the ſum certain is to be paid, though the Ship amounts not to that Burden.

If a Ship is freighted after the rate of 20 *l.* for every Month that ſhe ſhall be out, to be paid after arrival at the Port of *London*; the Ship is caſt away coming up from the *Downs*, but the Lading is all preſerved; yet the Freight is become due: For the Money ariſes due monthly by the Contract, and the Place mentioned is only to ſhew where payment is to be made, for the Ship deſerves Wages like a Mariner, who ſerveth by the Month; and though he dies in the Voyage, yet his Executors are to be anſwered *pro rata*. Beſides, the Freight becomes due by intendment on the delivery or bringing up of the Commodities to the Port of *London*, and not of the Ship.

If a Man freights a Ship out, and covenants that the Ship with the firſt Wind and Opportunity ſhould ſail out of that Port to *Cales*, and the Freighter covenants that he for the Freight of all the Premiſſes would pay unto the Maſter 184 *l.* *pro tota transfretatione omnium premiſſarum*, if the Maſter doth not aver that the Ship did arrive at the Port of *Cales*, he cannot maintain an Action againſt the Freighter. 1 *Bulſtr.* 176. 1 *Inſt.* 204. *a* *Dy.* 76. *a.* 2 *Sand.* 350.

If the Maſter enters into a *Charter-Party* for himſelf and Owners, the Maſter in that caſe may releaſe the

the Freighters without adviſing with the Owners; but if the Owners let out to Freight ſuch a Ship whereof *J. S.* is Maſter, though the Maſter covenant in the ſame *Charter-party* and ſubſcribes, yet his Releaſe in that caſe will not bind the Owners, but the Owners Releaſe on the other hand will conclude the Maſter: And the reaſon is, for that the Maſter is not made a proper Party to the Indenture. And ſo it was ruled, where an *Indenture* of *Charter-party* was made between *Scudamore* and other Owners of the good Ship called the *B.* whereof *Robert Pitman* was Maſter on the one Part, and *Vandenſtene* on the other Part; in which Indenture the Plaintiff did covenant with the ſaid *Vandenſtene* and *Robert Pitman*, and bound themſelves to the Plaintiff and *Robert Pitman* for performance of Covenants in 600 *l.* and the Concluſion of the Indenture was, —— *In witneſs whereof* the ſaid *Robert Pitman* put his Hand and Seal, and delivered the ſame; in an Action of Covenant for not performing certain Covenants in this Indenture, the Defendant pleaded the Releaſe of *Pitman*; whereupon the Plaintiff demurred: And it was adjudged, That the Releaſe of *Pitman* did not bar the Plaintiff, becauſe he was no Party to the Indenture; and the diverſity in that caſe was taken and agreed between an Indenture reciprocal between Parties on the one ſide, and Parties on the other ſide, as that was; for there no Bond, Covenant or Grant can be made to or with any that is not party to the Deed; but where the Deed indented is not reciprocal, but is without a *Between, &c.* as *Omnibus Chriſti fidelibus, &c.* there a Bond, Covenant or Grant may be made to divers ſeveral Perſons.

Cro Eliz. 56 *Scudamore &* *al'* *verſus Pitman.* *Trin* 29. *Eliz. in B. R.* cited in *Coke* 2 *Inſtit. fol.* 673. 2 *Levinz.* 74. *Cook & Child* & 3 *Levinz* 138. *Gilby verſus Copley.* *que ſemble contra.*

If an Indenture of *Charter-party* be made between *A.* and *B.* Owners of a Ship of the one Part, and *C.* and *D.* Merchants of the other Part, and *A.* only ſeals the Deed of the one Part, and *C.* and *D.* of the other Part; but in the Indenture it is mentioned that *A.* and *B.* covenant with *C.* and *D.* and *C.* and *D.* covenant with *A. B.* in this Caſe *A.* and *B.* may join in an Action againſt *C.* and *D.* tho' that *B.* never ſealed the Deed, for he is a Party to the Deed, and *C.* and *D.* have ſealed the other Part to *B.* as well as to *A.* *Clement* againſt *Henley*, 2 *Rolls Abr.* 22.

XVII. Covenant upon a *Charter-party*, by which the Maſter of the Ship covenants to ſail with the firſt fair Wind to *Barcelona*, and that the Mariners ſhall attend with a Boat to relade the Ship, and then to return with the firſt fair Wind to *London*, and to unlade and deliver the Goods, and the Merchants covenant to pay ſo much for Freight, and ſo much for Demurage every day; the Maſter brought his Action for the Freight and Demurage, and declares that he ſailed ſuch a Day with the firſt fair Wind, and upon all the other Points. The Defendant, *quoad* the Freight, that the Ship did not return directly to *London*, but went to *Alicant* and *Tangier* and made divers Deviations, and by theſe delays the Goods were ſpoiled, and as to the Demurage, that this was occaſioned by the Negligence of the Mariners in not attending with the Boat to relade the Ship; to which the Plaintiff demurred, and *per Curiam pro Quer.* for that the Covenants are mutual and reciprocal, upon which each ſhall have his Action againſt the other, but ſhall not plead the breach of one in bar of another, for perhaps the damage of the one ſide and of the other are not equal. 3 *Levinz* 41. *Cole contra Shallet.* Sir *Tho. Jones* 216. *Showers* againſt *Cudmore.*

Covenants mutual ſhall not be pleaded one againſt the other.

In Covenant the Plaintiff declared, that he covenanted to ſail with a Ship to *D.* in *Ireland*, and there to take 280 Men of the Defendant's, and to carry them to *Jamaica*, and the Defendant covenanted to have the 280 Men there ready, and to pay for their carriage 5 *l.* for each Man, and that the Defendant had not the 280 Men ready, but that he had 180, which he took on Board, and carried them, but that the Defendant had not paid for them; the Defendant pleaded that he had the 280 Men ready, and tendered to the Plaintiff, who refuſed to receive them, but ſaid nothing as to the carrying of the 180 Men, nor to the Payment for them; and for that it was not a Plea to all, Judgment was given for the Plaintiff upon Demurrer, 1 *Levinz* 16. 1 *Keble* 100.

Plea that anſwers to Part only is ill. *Cro. El.* 268. *pl.* 3. 330 *pl.* 10. 433, 434. *Cro. Jac.* 27. 1 *Sand* 27. 28. 2 *Sand.* 127. *Lutw.* 1492. *Plowd.* 138.

CHAP.

CHAP. V.

Of Wreck.

I. *Of Goods wreckt, as in relation to the Alteration of the Property by the Civil Law.*
II. *Of the Preſervation of Goods* wreckt, *and the Puniſhment of thoſe that ſhall add Miſery to the Condition of ſuch Perſons ſo diſtreſs'd.*
III. *Of Goods* wreckt, *their Preſervation according to the Laws of* Oleron, *and of* England, *and of the Puniſhment of thoſe that ſhall not make Reſtitution.*
IV. *Of Contribution where the Ship periſhes, and the Goods are all ſaved, and where not.*
V. *The King of* Great Britain's *Prerogative as in relation to* Wreck *and other Royalties of the Sea.*
VI. *Of* Flotſam, Jetſam, *and* Lagan, *where the King ſhall have the ſame, and whether by the Grant of* Wreck *the ſame paſſes; and where a Subject may preſcribe.*
VII. *Of Ships* wreckt *and no Creature in them, yet no* Wreck; *and of Ships forſaken, whether in Law accounted loſt or wreckt, or neither.*
VIII. *Of the Sheriff's Duty as in relation to Goods* wreckt; *and of Owners their time of claiming their Property.*
IX. Wreckt *Goods not to pay Cuſtom.*
X. *Of* Wreck, *in the* Iſle *of* Wight, *not in the Admiral without ſpecial Words.*

I. IN matters of *Wreck* there is, as it were, a Contract between them which have loſt their Goods by ſuch Misfortune, and them upon whoſe Lands the Goods and Merchandize are driven, that the ſame be reſtored to them or thoſe that claim under them. And therefore by the *Civil Law*, it is preciſely forbid, that no Man ſhall meddle with ſuch Goods as are wreckt; and ſuch as are proved to have ſtoln any thing thereout, are holden for Robbers; for that ſuch Goods being caſt on Land and recovered out of the Sea, remain ſtill his who was the Owner thereof, and deſcend upon his Succeſſor; neither Eſcheat to the King, neither to any other to whom the King hath granted ſuch Royal Privilege.

Leg. ne quid ff. de incendio, ruina & naufragio.

Leg. 44. D. de acq. rer. dom.

The reaſon why the Laws were ſo ſtrictly declared by the *Romans*, was, for that by the Laws of *Rhodes*, if any Ship had become Wreck, though all the Perſons were ſaved

ved and alive, yet the Ship and Goods became ſeizable by the Lord: But the ſame being barbarous, was afterwards repealed and abrogated.

The Emperor *Conſtanſtine* the Great ſays, in this Caſe, if any Ship at any time by any Shipwreck be driven to the ſhore, or touch at any Land, *Let the Owner have it, and let not my Exchequer meddle with it: For what Right hath my Exchequer in another man's Calamity, ſo that it ſhould hunt after Gain in ſuch a woful Caſe as this is?* *Leg.* 1. *lib.* 11. C. *de Naufrag.*

And yet if no Kindred appear within a Year and a Day, or, appearing, prove not the Goods ſhipwreck'd to be theirs, the Goods come to the *Exchequer*, even by that Law: So much that Law condemns careleſſneſs, which is written, *vigilantibus & non dormientibus, &c.* And with this agree the Laws of *Oleron* and the Laws of this Land, as taken out of thoſe Imperial Laws, in that Point, as is conceived.

II. The *Civil Law* was ever ſo Curious and Careful to preſerve the Goods of ſuch miſerable Perſons, that if any ſhould ſteal ſuch, they ſhould pay four-fold to the Owner, if purſued within a Year and a Day, and as much to the *Prince* or his *Admiral*: So careful were they, and ſo exact in requiring Reſtitution, that the very ſtealing of a Nail, or the Worth thereof, obliged the Thief to the Reſtitution of all the remaining Goods. And by the Emperor *Antonius* it was made a Law for ſuch ſort of Men, that they ſhould be batten'd and baniſh'd for three Years; but that was for only thoſe of a high and honourable Rank: But thoſe that were Baſe and Ignoble, ſhould be ſcourged and ſent to the Gallies or Metal Mines. *Leg.* 1. *in pr. de incend. ruin. leg. in eum cum auth. ſeq. de furt. Leg.* 3. *in fin. de incend. ruin. naufrag.* *Leg. pedibus eod.*

And the preventing of Help to ſuch ſhipwreckt Perſons, was puniſh'd with the ſame Suffering as a Murderer. *Arg. leg. ſuccularit. de Extrod. crim.*

The like for thoſe that put forth any treacherous Lanthorn or Light, with Intention to ſubject others to Danger or Shipwreck, theſe were puniſhed with Death.

And though no Harm happens, yet he may be puniſhed: Hence it is, that Fiſhers are forbidden to fiſh with Lights in the Night, for fear of betraying Sailers. *Per leg. incend. ruin. naufrag. Leg. ne piſcator.*

III. And here I cannot omit the great and pious Care that his Majeſty hath had, in his Directions about Light-Houſes and Lanthorns, and other ſpecial Sea-marks; but more eſpecially in his

his erecting at his own Princely Charge, that moſt Excellent Light-Houſe near *Goldſon* by *Yarmouth*, which, both for Height, Curioſity and Form, is not inferior to, if not excelling, all, or moſt, in Chriſtendom.

III. And as the Emperor, and other maritime Kingdoms, had in ſome ſort abrogated and repealed that cruel Law, and ſubjected the Violaters to Puniſhment for the Inhumanity offered to ſuch diſtreſſed Perſons; ſo our Famous King *Richard*, returning from the Holy War, in his own Experience at Sea, became ſenſible of the Miſeries which Merchants and Mariners at Sea underwent, their Lives being always within few Inches, often within an Hair's Breadth of Death; and having Conſideration of their Calamities and Diſtreſſed State in his Voyage, reſolved to revoke that Law, and at *Oleron* in the Bay of *Aquitain* (then part of his Dominions, as Sovereign Lord of the Ocean, and all thoſe Maritime Kingdoms) did there, amongſt other good Marine Laws, declare, *That if any Perſon or living Thing eſcaped out of any wrecked Ship to Land, it ſhould not be Wreck or confiſcated to him or his Succeſſor, as it was before, though all the Men eſcaped alive.* For before that, both in *England* and in * *Normandy*, the † Crown was entitled to ſhipwreckt Goods, and the King *Jure Gentium* (indeed according to the *Rhodian* Law) became Heir unto them, which otherwiſe *Jure naturali* were conceived to be *in bonis nullius*, pertaining to no Owner: But now that Valiant and Religious Prince reſolved no longer to embrace ſo cruel a Prerogative, by the ſtripping the diſtreſſed Mariners of thoſe Rags of their Eſtates, which the Mercy and Modeſty of the Waves and Winds had left them; and therefore in the Month of *October* at *Meſſana*, in the preſence of many Archbiſhops, and Biſhops, and others, he then for ever quitted the Royal Claim to Wrecks, which afterwards was declared and publiſhed at *Oleron* in his own Territories; ſo that if any Man out of the Ship came alive to ſhore, the Property of the ſhipwreckt Goods was ſtill preſerved to the Owner: Which Royal Condeſcention was ſo enlarged by our ſucceeding Kings, *That if a Man, Dog, or Cat eſcapes alive out of the Ship, neither the Ship or other Veſſel, nor any thing therein ſhall be adjudged* Wreck, *but the Goods ſhall be ſaved and kept* by

* *Bracton, lib.* 2. *cap.* 5.
† *Cuſtuma Norman. c.* 17.

Roger Hoveden in the latter part of his Annals, *fol.* 678. *Joan. Brompton. Chron. Coll. fol.* 1887.

by the Sheriff, Coroners, *or the King's Bailiffs, and delivered to the Inhabitants of the Town where the Goods are found; ſo that if any, within a Year and a Day, ſue for thoſe Goods, and after prove that they were his at the time of the Shipwreck, they ſhall be reſtored to him without delay: But if not, they ſhall be ſeized by the ſaid Sheriff, Coroners, or Bailiffs for the King's uſe; and ſhall be delivered to the Inhabitants of the Town, who ſhall anſwer before the Juſtices for the Wreck belonging to the King: But this good Law extends not to Pirates, Robbers, Sea Rovers,* Turks, *or other Enemies to the Catholick Faith.* *Weſtm.* 1. *c.* 4. 3 *E.* 1. 2 *Inſt.* 166. *Per Leg. Oleron, cap.* 47

Where the *Wreck* belongs to another, he ſhall have it in like manner; and if any be attainted to have done otherwiſe, he ſhall ſuffer Impriſonment, make Fine to the *King*, and yield Damage alſo.

If a Bailiff do it, and it be diſallowed by his Lord, the Bailiff ſhall anſwer for it if he hath wherewithal; but if not, the Lord ſhall deliver his Bailiff's Body to the King.

IV. If the Ship periſhes only, and the Goods are ſafe, in that Caſe the Goods ought to pay a Proportion of a fifth or tenth Penny, according to the eaſy or difficult Winning or Saving of the ſaid Goods. Rich Goods, as Gold, and Silver, and Silk, pay leſs than Goods of great Weight and Cumber, being in leſs Danger, unleſs it were a Wreck going into a Port, which the Skipper was not bound for; there *è contra*, then the Skipper is not to be conſidered. *Leg.* 37. *Naval. Rhod.* & 40.

Goods may be retained for Payment of Salvage. *Ld. Raym.* 393.

But if the Ship and Goods periſh in the Sea, and the Owners do totally forſake her, and ſo ſhe becomes a meer *Derelict*, in that Caſe the firſt Poſſeſſor that recovers her, or any part of her Lading, gains a *Property*: And this according to the Laws of Nations, *as is that given for loſt, whereof there is no Hopes of Recovery*, like a Lamb in the Paws of a Lion. And the incomparable *Ulpian* compares ſuch a *Dereliction* to a Man that knows his own Goods to be by another Man detained, and makes no Claim unto them in a long time; unleſs ſome Cauſe do manifeſtly appear, ſeems to do it to no other purpoſe but to ſhew that he is willing to renounce them; and this is it what *Ulpian* elſewhere intends, where he ſaith, that a Houſe poſſeſs'd for a long time by another, and no Claim made, nor

nor Rent demanded for it, ſeems to be deſerted by the right Owner.

To exact Intereſt long ſince due, ſaith the good Emperor *Antonius, is hardly juſt; for the not demanding it in ſo long a ſpace, makes it probable that thou wert willing to remit it; and that by not ſo much as demanding it, thy purpoſe was to make thy ſelf the more Beloved and Honoured, and thy Debtor the more Thankful.*

Now that Silence ſhould be of ſuch a force as to juſtify our Preſumption of a *Dereliction*, two things are requiſite; Firſt, That he that is ſilent knows that he hath a Right; for him that knows it not, Silence cannot prejudice. Secondly, That his Silence be free and voluntary, and not occaſioned by Fear, or any other ſuch Cauſe; and the true Reaſon is, that it is hardly poſſible that in a long time a Man ſhould not by ſome Means or other arrive at the Knowledge of his own Right, time daily adminiſtring occaſions to the diſcovery of Truth.

But becauſe that time, which exceeds the Memory of Man, is in a moral Senſe infinite, therefore if Claim be not made with *a reaſonable time* to a thing out of Poſſeſſion, it is a ſufficient Preſumption that it *is forſaken*, unleſs ſome very ſtrong Reaſons be brought to the contrary; and therefore the recovery of the Plate near the *Bahama* Rocks, loſt near fifty Years before by the *Spaniard*, became moſt apparently a Derelict, and free not only for the Undertakers to recover and poſſeſs, but to keep as a Property juſtly acquired by them, as well by the Laws of Nations, as the *Civil Law*.

Grotius, lib. 2. *cap.* 4. §. 5, 6.

Duke of *Albemarle & al. in Anno* 1687.

17 *E.* 2. *c.* 11. V. The *King* ſhall have Wreck of the Sea, Whales, and great Sturgeons taken in the Sea, and elſewhere throughout the whole Realm, except in Places privileged by the *King*.

Ld. Raym. 474. Alſo Wreck may be claimed by Preſcription: and the Lord High Admiral poſſibly may have it by Preſcription.

Ld. Raym. 473. A Grant of Wreck to the Lord High Admiral as appertaining to his Office, will not paſs Wreck belonging to the King's Manor by Preſcription.

Sir *Henry Conſtable*'s Caſe, *Coke*, 5 *part. fol.* 107. VI. By the Grant of Wreck will paſs *Flotſam*, *Jetſam*, and *Lagan*, when they are caſt upon the Land; but if they

they are not caſt upon the Land, the Admiral hath Juriſdiction, and not the *Common Law*, and they cannot be ſaid Wreck.

Wreccum Maris, are ſuch Goods only as are caſt and left upon the Land by the Sea. 5 *Co.* 106. *a.* 5 *Co.* 106. *b.*

Flotſam, is when a Ship is ſunk, or otherwiſe periſhed, and the Goods float upon the Sea.

Jetſam, is when the Ship is in danger to be ſunk, and for lightning the Ship the Goods are caſt into the Sea, notwithſtanding which the Ship periſheth. *Ibid.*

Lagan vel Ligan, is when the Goods being heavy, are caſt into the Sea before the Ship periſhes, which by the Prudence of the Maſter or Mariners, who have an Intent to ſave them ſo ſunk, as that they may come at them again; in order to which they faſten a Buoy or other light Matter, that may ſignify to them where they lie, if Providence ſhould bring them in a Condition to retake them; *& dicitur Ligar à ligando.* *Ibid.* *Bracton, lib.* 3. *c.* 2.

The King ſhall have *Flotſam*, *Jetſam* and *Lagan*, when the Ship periſheth, or when the Owners of the Goods are not known; but when the Ship periſhes not, *è contra.* *F. N. B.* 122. 46 *E.* 3. 15. *Anth. Omnes peregrini communia de ſucceſſionibus acq. per Leg. Oleron.*

A Man may have *Flotſam* and *Jetſam* by the King's Grant; and may have *Flotſam* within the high and low Water-mark by Preſcription, as it appears by thoſe of the Weſt-Countries, who preſcribe to have Wreck in the Sea; ſo far as they may ſee a *Humber* Barrel. *Coke* 5. *part. fol.* 107. *Coke* 2 *Inſtit. fol.* 167.

VII. If the Ship be ready to periſh, and all the Men therein, for Safeguard of their Lives, leave the Ship, and after the forſaken Ship periſhes, if any of the Men be ſaved and come to Land, the Goods are not loſt. *Leg.* 8. *D. de leg. Rhod. de jactu.*

A Ship on the Sea was purſued by Enemies, the Men therein for Safeguard of their Lives, forſake the Ship, the Enemies take the Ship, and ſpoils her of her Goods and Tackle, and turn her to Sea; by ſtreſs of Weather ſhe is caſt on Land, where it happened her Men arrived: It was reſolved by all the Judges of *England*, that the Ship was no Wreck, nor loſt. 5 *R.* 2. *pro. Willielmo Fiſhlake Co.* 2 *Inſt. f.* 167. *Leg.* 43. §. 11. *D. de furt.*

VIII. If Goods are caſt up as a Wreck, and it falls out they be *bona peritura*, the Sheriff may ſell them within the Year, and the Sale is good; but he muſt account to the true Owners. *Pl. Com.* 466.

F. N. B. *fol.* 112. *c.* The Year and Day ſhall be accounted from the Seizure, 2 *Inſt.* 168. 5 *Co.* 107. *b.* 1 *Keb.* 657.

Owners claiming the Wreck, muſt make their Proo by their Marks or Cocquets, by the Book of Cuſtoms, o by the Teſtimony of honeſt Men; and if the Wreck be longs to the King, the Party may ſue out a Commiſſion to hear and determine, and that by the Oaths of twelve Men; or elſe he may bring his Action at Law, and make out hi Proof by *Verdict*; but ſuch Action muſt be brought *within the Year and Day.*

5 *Co.* 126. *b.*

Note, Flotſam, Jetſam and *Lagan*, are Goods on or in the Sea, and belong to the King, who by Charter hath granted them to the Lord Admiral.

Left unreſolved in *Moor fol.* 224. But ſince adjudged in C. B. upon a ſpecial Verdict found at *St Edmund's Bury* in *Suffolk. Shephard v. Goſnold, Hill.* 23, 24 *Car.* 2. *Rot.* 615. *Vaughan, fol.* 159.

IX. If Goods were wrecked on the Shore, and the Lord having Power, takes them, he ſhall not pay Cuſtom, neither by the *Common Law* nor by the *Statute*; for at the *Common Law*, wrecked Goods could not be charged with Cuſtom, becauſe at the *Common Law* all *Wreck* was wholly the King's, and he could not have a ſmall Duty of Cuſtom out of that which was all his own; and by *Weſtm.* 1. where wrecked Goods belonged more to another than to the King, he ſhall have it in like manner, that is, as the King hath his.

Now Goods that are chargeable with Cuſtom, according to the Act of *Tunnage and Poundage*, muſt have theſe Properties.

12 *Car.* 2. *c.* 4.

1. They muſt be Goods which ſhall come or be brought into the Ports or Places of the Kingdom.

2. They muſt come or be brought into ſuch *Ports* or *Places*, as *Merchandize* that is for ſale, and to that end; for there can be no other Conception of *Goods* brought as *Merchandize.*

3. They muſt come and be brought as *Merchandize*, and for ſale by the King's natural born Subjects, or by Strangers and Aliens, as diſtinguiſhed from the natural Subjects.

4. The Duty payable to the King, is to be meaſured by the Quality of him that imports the Commodity; that is, if the Importer be a natural Subject, he pays leſs to the King; and if an Alien, more.

5. All thoſe Goods charged with the Duty by the *Statute*, ſo to come, or be brought into Ports or Places of the Kingdom, are to be foreign, as of the Growth of *France*, the *Levant*, *Spain*, *Portugal*, *Germany*, &c.

Whence

Whence it follows, 1. That Goods of foreign Growth, and which by their kind are to pay Duty, if they ſhall come or be brought into the Ports or Places of the Kingdom, neither by the King's natural born Subjects, nor by Aliens, they are not chargeable with the Duties mentioned in the Act.

2. If they are not brought into the Ports and Places of the Kingdom as Merchandize, *viz.* for Sale, they are not chargeable with the Duty; but Wines or other Goods coming or brought into the *Realm* as *Wreck*, are neither brought into the Kingdom by any of the King's *Natural born Subjects*, nor by any *Strangers*, but by the Wind and Sea; for ſuch Goods want a Proprietor until the Law appoints one.

3. *Wretked Goods* are not brought into the Kingdom, being caſt on Shore, as Merchandize, *viz.* For Sale; but are as all other the native Goods of the Kingdom, indifferent in themſelves, for Sale or other uſe at the Pleaſure of the Proprietor.

4. All Goods foreign or domeſtick are, in their Nature, capable to be Merchandize, that is, to be ſold; but it follows not thence, that whereſoever they are brought into the Kingdom, they are brought as Merchandize, and to be ſold, and ſhould pay Cuſtom; for they are transferred from Place to Place, more for other uſes than for Sale.

5. All Goods charged with the Duty of the Act, muſt be propriated by a Merchant *Natural born*, or Merchant *Alien*, and the greater or leſs Duty is to be paid, as the Proprietor is an Alien or Native Merchant; but wrecked Goods are not the Goods of any Merchant *Natural born*, *Alien* or *Denizen*, whereby the Duty payable ſhould be either demanded, diſtinguiſhed, or paid: Therefore a Duty impoſſible to be known, can be no Duty; for Civilly *what cannot be known to be, is as that which is not.*

6. All Goods ſubject to the Duty of Tunnage and Poundage, may be forfeited by the Diſobedience and Miſbehaviour of the Merchant-Proprietor, or thoſe truſted by him, As *unſhipping before Payment, or lawfully tendring or agreeing for*, &c. But wrecked Goods cannot be imported into any Creek or Place of the Realm by way of Mer-

chandize, and unſhipped to be laid on Land; for if ſo imported and unſhipped to be laid on Land, it is no Wreck, and therefore are not Goods forfeitable by the Miſbehaviour of any within the Act; and conſequently not Goods intended to be charged with the Duties by the Act.

Goods drowned or loſt in paſſing a Ferry, a great River, or an Arm of the Sea, are not to be ſaid to be exported, though they be carried to Sea; but Goods exported are ſuch as are conveyed to Sea in Ships or other Naval Carriages of Man's Artifice; and by like Reaſon, Goods imported muſt not be Goods imported by the Wind, Water, or ſuch inanimate Means, but in Ships, Veſſels, and other Conveyances uſed by reaſonable Agents, as Merchants, Mariners, Sailors, *&c.* Whence it may be concluded, that Goods or Merchandize imported within the Meaning of the Act, can only be ſuch as are imported with Deliberation, and by reaſonable *Agents*, not caſually and without Reaſon; and therefore wrecked Goods are no Goods imported within the Intention of the Act, and conſequently not to anſwer the King's Duties; for Goods, as Goods, cannot Offend, Forfeit, Unlade, pay Duties, or the like, but Men whoſe Goods they are: And wrecked Goods have no Owners to do thoſe Offices, when the Act requires they ſhould be done; therefore the Act intended not to charge the Duty upon ſuch Goods.

L. *Raym.* 501, 502.

Per Holt, C. J. That Wreck ſhall not pay Cuſtom, has never been made a Doubt ſince the Caſe in *Vaughan*, 159. of *Shephard v. Goſnold.* L. *Raym.* 388. The ſame Point (including *Flotſam*) reſolved by both Courts, *viz.* *C. B.* and then *B. R.* on Error brought.

The very Words of the L. *Howard's* Patent, in 28 *Eliz. in Rot. Admir. m.* 10.

The Admirals of *England*, *ut magnus Admirallus Angliæ, Hiberniæ, Walliæ, ac Dominiorum & Inſularum earundem, Villæ Caliſiæ & Merchiarum ejuſdem, necnon Gaſconiæ, Aquitaniæ, claſſium & Marium dictorum Regnorum Angliæ præfectus generalis, &c.* which are the words of their Patents uſed at this day, do claim all Wrecks ariſing from any of thoſe Places, by virtue of their Grants.

And yet in the like Caſe, in all Circumſtances, between *Power* and Sir *William Portman*, *Hill.* 6. *William Com. B. Rot.* 1431. where the Judges, and more particularly

arly Juſtice *Treby*, ſeemed to be of Opinion, that Goods wrecked, or Flotſam, ſhould pay Cuſtom.

X. King *Edward* the Second, in the firſt Year of his Reign, by his Charter, granted the Caſtle of *Carisbrook*, with all the Lands and Tenements in the *Iſle of Wight*, formerly belonging to *Iſabella Fortibus*, Counteſs of *Albemarle*, to his great Favourite *Peter de Gaveſton*, and *Margaret* his Wife, and the Heirs of their two Bodies begotten (together with ſundry other Caſtles and Lands) and commanded *Nicholas de Boſco* to put him into actual Poſſeſſion; and likewiſe commanded *Robert de Sanſon*, Keeper of the Foreſt of *Parkburſt* in that Iſle, to be Intendent to them for the Farm he had granted him for Life, for the Cuſtody thereof, which being afterwards ſoon reſeized into the King's Hands, he granted this Caſtle with all its Services, and all his Lands in that Iſle, to *Edward* his Son and his Heirs Kings of *England*, and afterwards, for the aſcertaining what did of Right belong to the ſame Caſtle, an Inquiſition went out by which it was found, *inter alia, qd' wreckum Maris pertinens ad dictum Caſtrum valet per Ann.* 4 s.

1 E. 2. m. 6. num. 6.

Pat. 20. E. 2. m. 10. intus pro Edvardo filio Regis.

So that, by the general Patent of the Admiral, will not paſs the Wreck of this Iſle, without ſpecial Words granted in the Patent.

Inquiſit. de An. 47 H. 3. n. 32.

Note, If the Wreck happened, or was occaſioned by reaſon of any Fault or Negligence in the Maſter or Mariners, the Maſter muſt make good the Loſs; but if the ſame was occaſioned by the Act of God, to avoid an Enemy or Pirate, and the like, there he ſhall be excuſed.

Leg. 3. §. 1. D. Naut. caup. St lib. 1. §. 4. D. de obl. & act. leg. 26. §. 6. D. mand. Quia vis major providentiam & induſtriam humanam ſuperat, niſi culpa caſum præceſſerit.

CHAP. VI.

Of Averages and Contributions.

I. *Of Goods and Merchandize, when ſubject to be caſt over-board.*
II. *Of the Account rendred of ſuch ejected Goods, and by whom.*
III. *Of the antient Laws of* England, *in reference to ſuch Ejectments.*
IV. *What Goods muſt come into the* Average, *and what are exempt. The Deſcription of* Average.
V. *The Maſter diſcharged by ſuch Acts, by the Common Law.*
VI. *The Ship's Gear or Apparel, whether within the* Average.
VII. *The reſidue of the Goods where tacitly obliged to anſwer the* Average.
VIII. *Of Goods remaining on ſhip-board, ſpoiled by reaſon of the ejecting of others, where ſubject to the* Average.
IX. *Where Ship and Lading are both made liable to the* Average.
X. *Of Miſfortunes not ſubject to an* Average.
XI. *Where the remainder of the Goods are exempted from the* Average, *and the Damage of the ejected Goods falls on the Maſter.*
XII. *Damage to the Ship, where the Lading contributes, and the ſtandard Rate in Contributions.*
XIII. *The Maſter becomes a Captive for the Redemption of Ship and Lading, where liable to the* Average, *and where diſcharged.*
XIV. *What Goods are ſubject to the* Average.
XV. *Contribution for* Pilotage, *and where the remaining Goods not ſubject to* Average.
XVI. *Rules general for ſettling the* Average.
XVII. *Three Sorts of Goods taken at Sea.*

Leg. Rhod. de jact.

Bracton, lib. 2. *fol.* 41. *b. n.* 3.

I. SHIPS being freighted and at Sea, are often ſubject to Storms, and other Accidents, in which, by the antient Laws and Cuſtoms of the Sea, in *extreme Neceſſity*, the *Goods*, *Wares*, *Guns*, *or whatſoever elſe* ſhall be thought *fit*, may in ſuch Extremity be flung over-board; but then the Maſter ought to conſult with his Mariners, who if they conſent not, and yet the Storm and Danger continues; the Maſter may command notwithſtanding, the caſting over-board what he ſhall judge moſt fitting for the common Safety of the reſt. So likewiſe Goods coming from infected Towns or Places may be caſt over-board; and if an Action be brought at *Common*

non Law, the Defendant may juſtify the ſame by pleading the ſpecial Matter. 49 *E.* 3. *fol.* 15.

If there be a *Super-Cargo*, a Requeſt ought to be made to him to begin firſt; but if he refuſes, the Mariners may proceed. *Leg. Oleron*, *cap.* 8.

II. If the Ship ſo fortunes as to out-weather the Storm, and in Safety arrives at her Port of Diſcharge, the Maſter, and moſt of the Crew, muſt ſwear that the Goods were caſt over for no other Cauſe but purely for the *Safety of the Ship and Lading*. The Cuſtom of clearing of that Point, varies according to the ſeveral Countries or Places they arrive at. *Leg. Conſolat. del Mere.* *Leg. Wiſbicenſ. Art.* 38, 39.

Where Goods are laden above the *Overlope*, or forbidden Goods be tranſported; if ſuch Goods happen to be the Cauſe of any Danger or Damage, the Maſter ſhall bear the Loſs; alſo he may be proſecuted Criminally.

III. King *William the Conqueror*, and *Henry the Firſt*, made and ratified this Law concerning Goods caſt over-board by Mariners in a Storm, in Imitation of the antient *Rhodian Law*, *De jact.* *Leges Guliel.* 1. & *H.* 1. *c.* 98. *de pactis ad legem Rhodiam.*

Si ergo jecero res tuas de Navi ob metum mortis, de hoc non potes me implacitare, nam licet alteri damnum inferre ob metum mortis quando periculum evadere non poteſt. Et ſi de hoc me meſces, qd' ob metum mortis nil feciſſe de comeſpriorari. Et ea quæ in navi reſtant dividantur in communi ſecundum catalla, & ſi quis jecerit catalla extra navim quando neceſſitas non exegerit, ea reſtituat. *Selden ad Eadmerum, & Notæ & Spicilegium, f.* 183. *Weelock de Priſ. Anglorum Legibus, fol.* 167.

IV. The Ship arriving in ſafety, the remainder muſt come into the *Average*, not only thoſe Goods which pay Freight, but all thoſe that have obtained Safety and Preſervation by ſuch *Ejection*; even Money, Jewels and Clothes, and ſuch like, are not exempted. *Leg.* 1. & 2. *ad leg. Rhod.* & *leg. Oleron.*

But thoſe things which are borne upon a Man's Body, Victuals, and the like, put on Ship-board to be ſpent, are totally excluded from the Contribution.

The Maſter ought to be careful, that only thoſe things of the *leaſt Value* and *greateſt Weight* be flung over-board. *Leg. Wiſbicenſ. Art.* 20, 21.

In the rating of Goods by way of Contribution, this Order is obſerved: If they chance to be caſt over-board before half the Voyage be performed, then they are to be eſteemed at the Price they coſt; if after, then at the *Johannes Locinius, l* 2. *c.* 7. *de Jactu*, & 8. *de Contributione*,

Price as the reſt, or the like, ſhall be ſold at the Place of Diſcharge.

The Perſon (whoſe Goods have been caſt) is to be careful to have the ſame eſtimated before the Ship do diſcharge, wherein the Maſter ought to be Aſſiſtant.

Average, in the Merchants Law, is uſed or taken for a certain Contribution that Merchants and others do proportionably make towards their Loſſes who have their Goods caſt into the Sea for the Safeguard of the Ship, or of the Goods and Lives of them in the Ship, in the time of Tempeſt; and this Contribution ſeems to be ſo called, becauſe it is proportioned after the Rate of every Man's Average or Goods carried. It is derived from the Word *Averia*, *Cattle*.

2 Rolle's Rep. 498. *Caps v. Tooker.* Goods are ſhipp'd in *England*, and a Tempeſt ariſeth, the Paſſengers, for ſaving their Lives, caſt them overboard, and another *Engliſh* Ship takes them, the Owners bring *Trover*, it lies, becauſe delivered upon the Land.

12 Coke 63. *2 Bulſtr.* 280. It is lawful for Paſſengers to caſt Goods over-board out of a Ferry-boat, in Caſe of a Tempeſt, for Preſervation of their Lives: So if the Ferryman ſurcharge the Boat with Goods, the Owners of the Goods ſhall have their Remedy againſt the Ferryman in this Caſe of a Surcharge, but not in the other Caſe.

2 Bulſtr. 280. *Bird v. Aſtoot.* *12 Coke* 63. V. As this Law doth take care that this common Calamity ſhould be borne by all the Parties intereſſed by a general Contribution, ſo the *Common Law* takes notice of the Misfortune, and makes Proviſion to indemnify the Maſter; and therefore if the Party, owner of ſuch *ejected* Goods, ſhall bring an Action againſt the Maſter or Owners of the Veſſel, the Defendant may plead the ſpecial Matter, and the ſame ſhall bar the Plaintiff.

Leg. 1. ff. de exercit. action. L. amiſſæ & Oleron. VI. But if the Ship's Gear or Apparel be loſt by Storm, the ſame is not within the *Average*, but is accounted like unto a Workman breaking or ſpoiling his Tools; except in the avoiding of a Danger, as the flinging the *Maſt* over-board, or the ſlipping the *Tow-Anchor* or *Boat*.

Goods brought ſecretly in the Ship againſt the Maſter or Purſer's Knowledge, if ejected, no Contribution is to be had.

VII. As

VII. As the *Common Law* looks upon the Goods and Cargo as a Pawn or Pledge for the Freight, ſo the *Marine Law* looks upon them likewiſe as a Security for the anſwering the *Average* and *Contribution*, and that the Maſter ought not to deliver the Goods till the Contribution is ſettled, the ſame being tacitly obliged for the one as well as the other. *Ad Leg. Rhod. l.* 2. *Si non conſervatis.* *Leg.* 1. *del. Mer. exempt.* & *leg. Si non ſortem de cond. in de.*

VIII. If through the riſing of the Ship, or the caſting or unlightning the Ship, any of the remaining Goods are ſpoiled, either with wet or otherwiſe, the ſame muſt come into the Contribution for ſo much as they are made worſe. *Leg. Navis* 4. *ad Leg. Rhod.* And *Vinius*'s Commentary *fol.* 235.

IX. If it falls out that a Ship entring into a Port or Channel, cannot make way, and there be a lightning or diſburdening of the Ship, then the Contribution falls two Parts to the Lading, and one third to the Ship, except the Ship ſurpaſs in value the Lading, or that there is ſome bad Quality in the Ship itſelf. *Leg.* 9. §. 3. *ad exbib.*

But to prevent that ambiguous Queſtion, if the Party covenants that the Goods ſhall be delivered at the Port covenanted and appointed, then Condition makes Law. L. 1. verſ. *quod convenit depoſ.*

So for the *Pilot*'s Fee and riſing of the Ship off Ground, when there is no Fault in the Maſter.

X. If two Ships happen to encounter and croſs each other, and the Crew ſwear their Innocency, Contribution muſt be made by a juſt Equality; but if one periſhes, as there can be no Proportion of the Loſs, ſo no Contribution. The reaſon given is, for that otherwiſe a Skipper might on purpoſe ſet an old weak Ship againſt a ſtrong Ship, and by that Means hedge himſelf into a Contribution and Recompence. However, this bars not the Owners from bringing their Action againſt the negligent Maſter, by which Means he may *recoop* himſelf in Damage, if it happens at Sea, the Action by the *Civil Law* is called *Legis Aquilæ.* *Leg. quemadmodum parag. Si navis ad leg. Aquiliæ.* *Fod. leg.* 18. *H.* 6. *num.* 52. 3 *Inſt. fol.* 146. *Goodwin verſ. Tompkins*, Noy Rep. 148.

If ſuch a Misfortune happens in the Night at Sea, the Party, if he will compleatly arm himſelf for his recovery, ought to prove, that he made out Light or Fire, or otherways gave notice by crying or calling out.

XI. If it falls out in the Ship or Veſſel, by the indiſcreet Stowing or Lading thereof above the Birth-mark, that ſuch *Ejection* happened, in that Caſe it has been uſed by the *Lnſt Servus.* §. 27. & *Si* 23. *ad leg. Aquil.*

the Marine Laws no Contribution to be made, but Satiſfaction is to be anſwered by the Ship, Maſter, or Owners.

If Salt or Corn be laid looſe, or in an heap by divers Perſons in one Ship, without Diſtinction, and the Maſter delivers to any of them their due Share or Quantity; but before the reſt receive their Share or Meaſure, the remaining Salt or Corn waſhes or loſes, thoſe that had the good Fortune to have their Shares, ſhall enjoy it without any Contribution to the other Partners. *Lex Mercat.* 110.

Ad leg. Rhod. leg. 2. §. Si Conſervatis. XII. If to avoid the Danger of a Storm, the Maſter cuts down the Maſts and Sails, and they falling into the Sea, are loſt, this Damage is to be made good by Ship and Lading *pro rata*: Otherwiſe if the Caſe happens by Storm or other Caſualties.

No Contribution is to be paid in Caſe one Ship ſtrike againſt another whereby Damage happens, but full Satiſfaction is to be anſwered the Merchant in Caſe of Fault or Miſcarriage in either; or an equal Diviſion of the Damage, in Caſe it happens by a *Caſualty*, as above.

F. de leg. Rhod. leg. navis onuſt. leg. navis ad leg. Rhod. de jactu. Moor 297. If a *Lighter* or *Skiff*, or the Ship's Boat into which part of the Cargo is unladen for the lightning of the Ship, periſh, and the Ship be preſerved, in that Caſe Contribution is to be made; but if the Ship be caſt away, and the Lighter, Boat, or Skiff be preſerved, there no Contribution or Average is to be had, it being a Rule, *No Contribution but where the Ship arrives in Safety.*

Leg. Rhod. de jactu, l. 2. Si navis à Piratis. XIII. If a Ship happens to be taken, and the Maſter, to redeem the Ship and Lading out of the Enemies or Pirate's Hands, promiſes them a certain Sum of Money, for Performance whereof himſelf becomes a Pledge or Captive in the Cuſtody of the Captor; in this Caſe he is to be redeemed at the Coſts and Charges of the Ship and Lading, and Money, if there be any in her, are contributary according to each Man's Intereſt for his Ranſom.

Moor, fol. 297. pl. 443. Hicks verſus Palington. So where a Pirate takes part of the Goods to ſpare the reſt, Contribution muſt be paid.

But if a Pirate takes by Violence part of the Goods, the reſt are not ſubject to Average, unleſs the Merchant hath made an expreſs Agreement to pay it after the Ship is robb'd.

But

But if part of the Goods are taken by an Enemy, or by Letters of Mart and Repriſal, *è contra*. *Grot. de introd. jur. Holl.* part 29.

So likewiſe in Storm, if the ſame is done for Preſervation of the Remainder. *Sueton. jur. Naut.* in the end of chap. 13.

He may hypothecate the Ship for his own Redemption. L. *Raymond*'s Reports 22.

A Ship was taken by a *French* Privateer, and the Maſter of her ranſom'd her for 1800 *l.* (the Maſter having a Share in the Ship) the Mate was carried into *France*, as a Hoſtage for this Money. Lord *Chancellor* ſaid, the Ranſom Money muſt be raiſed out of the firſt Profits, notwithſtanding any former Mortgage of the Ship; for if there was a precedent Mortgage, what would have become of the Security if the Ship had not been redeemed: After the Ship was redeemed ſhe performed her intended Voyage, and the Freight-Money earned after her Redemption was the firſt Profits ariſing, and out of theſe the Ranſom-Money is to be ſatisfied. This was upon Motion. The Lord *Chancellor* ſaid, the Inſurers always paid part of the Ranſom-Money. *Hill. 7 Annæ, in Chancery, Lopes* and *Winter*.

XIV. In Ejectment the Maſter or Purſer of the Ship ſhall contribute for the Preſervation of the Ship, and alſo the Paſſengers for ſuch Wares as they have in the Ship, be it Pearls, precious Stones, and ſuch like; and Paſſengers that have no Wares or Goods in the Ship, yet in regard they are a burden to the Ship, Eſtimate is to be made of his and their Apparel, Rings, and Jewels, towards a Contribution of the Loſs; and generally all things in the Ship, except the Victualling and Proviſions of the Ship, and the Bodies of Men (unleſs Servants) muſt bear a proportionable Share in the Contribution.

The Eſtimate being made of the Goods loſt and ſaved, the Price is to be ſet down, not for how much they were bought, but how much they might be ſold for at the time when the Ejectment was made; and if any thing be flung into the Sea, and endamaged, and afterwards is recovered again, yet Contribution is to be made only for the Damage. *Peckius ad leg. Rhod. de jact. fol.* 196, 197, 198.

XV. Contribution is to be paid for the Pilot's Fee that hath brought a Ship into a Port or Haven for her Safeguard, (it being not the Place ſhe was deſigned for) ſo

to

to raiſe her off the Ground when there is no Fault in the Maſter.

Grotius introd jur. Holl. 329. *Vinius* and *Peckeus* Commentaries on the Laws of *Rhodes, ſol.* 236.

If a Maſter of a Ship lets out his Ship to freight, and then receives his Compliment, and afterwards takes in Goods without leave of the Freighters, and a Storm ariſes at Sea, and part of the Freighters Goods are caſt over-board, the remaining Goods are not ſubject to the Average, but the Maſter muſt make good the Loſs out of his own Purſe.

The Goods which are loſt are to be valued, and the Goods ſaved are to be eſtimated, which being known, a proportionable Value is to be contributed by the Goods ſaved, towards Reparation of the Goods *ejected*, or caſt over-board.

Lo:inus, lib. 2. *cap.* 8, 9, 10, 11.

In which, regard is always had, not to what might be got by the Goods loſt, but what the intrinſick Damage is by the loſs of the ſame; the which are not to be eſtimated what they might have been ſold for, as what they coſt, or were bought for.

The Cuſtom of Places varies this *Modus* of eſtimating; the which is done by Merchants and Mariners indifferently nominated by the Court.

XVI. But now the Cuſtom is general, the Goods ſaved and loſt are eſtimated according as the Goods ſaved were ſold for, Freight, and other neceſſary Charges, being firſt deducted.

Ad leg. Rhod. §. ult. Inſtit. de rer. diviſ. & leg. 9. *§. ult. de acq. rer. Dom.*

If there were Plate, Jewels, or the like, in a Trunk, Cheſt, Pack or Bale, at the time of their Ejection, if there be a *Super-Cargo*, he ought to give notice, by diſcovering of the ſame to the Maſter or Mariners, otherwiſe he ſhall be anſwered in the Contribution no more than the bare extrinſick Value appeared to be: But the Aſſurers will hardly fare ſo well.

If Contribution ſhall be ſettled, and the Merchant will not agree, the Maſter may detain the Lading, for the ſame is as tacitly obliged to anſwer that as the Freight; and if at the *Common Law* the Merchant ſhould bring an Action, the Defendant ſhall bar him by pleading the ſpecial Matter.

ff. ibid. leg. Navis, §. cum autem.

If Goods are caſt over-board, and afterwards are recovered, Contribution ceaſes; ſaving for ſo much as they are dannified and made worſe by reaſon of ſuch Ejectment.

Leg. 25. *D. de prob. leg. falſus §. Si jactum D. de furt.*

Note, Goods caſt over-board to lighten the Ship, make no *Derelict*. 5 *Co.* 107. *b.*

And

And though ſuch Neceſſity ſeems to ſubject the Lading to Ejectment, to prevent the Ruin and Deſtruction of the Perſons, yet ſome Lading ſeems excepted, and therefore Cannon, and other Inſtruments or Proviſions *conſigned to relieve a City*, ought not to be flung over-board; for in ſuch Caſe the Law impoſeth on every Subject, that he prefer the urgent Service of his Prince, before the Safety of his Life.

Bacon's Max. fol. 17. *Privilegium non valet contra rempublicam.*

XVII. Goods taken upon the Sea, are of three Sorts. 1. Goods taken by Letters of Mart, by *jus Repriſaliarum*. 2. Taken from Pirates or Sea Rovers; And 3. From profeſſed Enemies. Thoſe Goods that are taken from Pirates, are eſteemed to be the juſt Prize or Prey to any Taker of them, ſo that an Account be given of them to the Admiral. If a Ship or Goods be taken from a profeſſed Enemy, it is to be proceeded in according to the Authority whereby it was taken. But if a Ship or Goods be taken by a profeſſed Enemy, and afterwards they are taken from him, and the ſame Owner claims them, they ought to be reſtored to him; for the Law looks upon theſe Goods as received, not taken, yet with ſome Recompence for them.

By an Act 13 *G.* 2. *c.* 4. If a Ship be retaken by a Man of War, the Owners are to pay one Eighth of the Value of the Ship and Cargo, in lieu of Salvage: If by a Privateer or other Ship they are intituled to one Eighth, in Caſe ſuch Ship hath been in Poſſeſſion of the Enemy 24 Hours: If above 24 Hours and under 48 one fifth Part: If above 48 Hours and under 96 one Third: If above 96 Hours they are intituled to a Moiety thereof.

By the ſaid Act Privateers have the ſole Property of what they take from the Enemy, being firſt adjudged lawful Prize in any of His Majeſty's Courts of Admiralty; as alſo 5 *l.* for every Man on Board every Ship of War or Privateer, taken, ſunk, burnt, or otherwiſe deſtroyed, who was living at the Beginning of the Engagement between them. And by a Proclamation iſſued in Purſuance of this Act, dated 19 *June* 1740, 'tis directed that the neat Produce of all Prizes, and the like Bounty Money for Priſoners taken by any of His Majeſty's Ships, be divided into eight equal Parts, whereof the Captain or Captains of any of His Majeſty's Ships of War,

War, who ſhall be actually on Board at the taking, ſhall have three Eights; but if ſuch Ship be under the Command of a Flag, and the Flag Officer being actually on Board, or directing and aſſiſting in the Capture, he is to have one of the ſaid three Eighths.

Captains of Marines, and Land Forces, Sea Lieutenants and Maſters on Board one Eighth.

Lieutenants and Quarter-Maſters of Marines, and Lieutenants, Enſigns and Quarter-Maſters of Land Forces, Boatſwain, Gunner, Purſer, Carpenter, Maſters, Mate, Chirurgeons, and Chaplain one Eighth.

Midſhipmen, Carpenter's Mates, Boatſwain's Mates, Gunner's Mates, Maſter at Arms, Corporals, Yeomen of the Sheets, Coxſwain, Quarter-Maſter, Quarter-Maſter's Mates, Chirurgeon's Mates, Yeomen of the Powder Room, and Serjeants of Marines or Land Forces one Eighth.

Trumpeters, Quarter-Gunners, Carpenter's Crew, Steward, Cook, Armourer, Steward's Mate, Cook's Mate, Gunſmith, Cooper, Swabber, ordinary Trumpeter, Barber, able Seamen, ordinary Seamen and Marine or other Soldiers two Eighths.

If any Commiſſion or Warrant Officer be not on board at the Time of the Capture, his Share to be caſt into the Shares allowed the Trumpeter, *&c.*

In Caſe any Perſon have more Offices than one, he is to have no more than what ſhall belong to his ſuperior Commiſſion.

CHAP.

CHAP. VII.

Of Policies of Aſſurance.

Aſſurances, by whom firſt introduced.
I. *Aſſurances, the Nature of them.*
II. *How eſteemed of by Law.*
V. *The various Ways of enſuring, and on what.*
V. *Aſſurance, when eſteemed moſt dangerous, and of fraudulent* Policies.
VI. *Of the Receipt of* Premio, *and the Cuſtom of Abatement on Loſſes.*
VII. Policies, *that now enſure againſt all the Accidents of Heaven and Earth.*
VIII. *A Ship enſured generally, whether the ſame includes the Cargo, and whether it is neceſſary in the* Policy *to mention the particular Goods.*
IX. *Caſes upon Aſſurances.*
X. *When the Policy is diſcharged by Deviation.*
XI. *Goods enſured in one Ship, are afterwards in the Voyage put into another, the ſecond miſcarries, whether the Aſſurers are made liable.*
XII. *A Man enſures more than the Value of the Cargo, the Cuſtom in ſuch a Caſe when uſurious.*
XIII. *A Ship is inſured from one Port to another, and there to be landed; the Cargo after Arrival is ſold, and before landed is burnt, whether the Aſſurers ſhall be made anſwerable.*
XIV. *A Ship inſured from one Port to* (blank) *being in Time of War taken, whether the Aſſurers ſhall anſwer.*
XV. *Of the Aſſured's renouncing after a Loſs; and what Operation the ſame has by Cuſtom.*

I. IT is conceived by *Suetonius*, that *Claudius Cæſar* was the firſt that brought in this Cuſtom of *Aſſurance*, by which the Danger and Adventure of Voyages is divided, repaired and born by many Perſons, who for a certain Sum, by the *Spaniards* called *Premio*, aſſure Ships or Goods, or both, or a Proportion, according as the Policy is *. *In vita Claud. Cæſar. lib. 25. cap. 18.*

II. By 43 *Eliz. c.* 12. An *Office of Aſſurance* was erected for deciding of Differences ariſing upon Policies of *Aſſurance* in *London*; and a Court was to be held for that Purpoſe, by Virtue of a ſtanding Commiſſion iſſued out by the Lord Chancellor to the Court of Admiralty, the Recorder of *London*, two Doctors of the Civil Law, two Common Lawyers, and eight Merchants; which Commiſſioners were to meet weekly, and to have Power to

* *Leg. 1. ff. qui Satiſd. cog. Grotius lib. 2. cap. 12. §. 3.*

to ſummon and examine Witneſſes, and hear and dete mine all Cauſes in a ſummary Way, ſubject to appeal the Lord Chancellor, &c. And by Stat. 14 *Car.* II. 25. ſeveral additional Privileges were granted to th Court, which was a Court of Equity, as well as of Law but now there is no ſuch Court in Being, and Cauſes this Nature are tryed in the ordinary Courts.

By 6 *Geo.* I. *c.* 18. His Majeſty was empowered t grant two Charters for Aſſurance of Ships and Merchan dize, &c. and to incorporate the Adventurers, in Con ſideration of a large Sum of Money by them to be ad vanced.

2 *Levinz.* 153. *Fowlk v. Pinſacbo.* III. *Indebitat. Aſſumpſit pro præmio*; upon a Policy of *Aſ ſurance* upon ſuch a Ship, the Defendant demurred ſpeci ally becauſe he did not ſhew the Conſideration certainly what the *Præmium* was, or how it became due, *ſed non allocat'* for it is as good as *Indebitat. pro quodam Salario,* which hath been adjudged good.

If the Perſon whoſe Name is uſed in the *Aſſurance*, be in Time of War taken to be no Friend to the State, there is danger to pay the *Aſſurance*; if after the Subſcription of the Aſſurer, the Goods ſhould be arreſted and made forfeited, to anſwer the ſame to the Prince, as it often happens.

Lex Mercat. 109. If Goods are ſtoln or embezzeled on Shipboard, the Maſter, not the Aſſurer is reſponſible. So if the Goods be loſt in default of the Pilot.

Aſſurance for 12 Months, how to be conſtrued. Policy of *Aſſurance* to warrant a Ship for twelve Months; the Ship did not periſh within the time of twelve Months, being accounted according to the Months of *January*, *February*, &c. but within twelve Months reckoning twenty eight Days to the Month, reſolved that the Policy was not forfeited; cited in Sir *Woollaſton Dixey*'s Caſe 1 *Leon.* 96.

IV. *Aſſurances* are of various ſorts, ſome being to places certain, others general: Thoſe that are made to places certain, are commonly upon Goods laden or to be laden aboard outward, and until the ſame Adventure ſhall be laid aſhore at ſuch a Port.

Leg. 4. 5. *D. de Naut. ſan.*

Or upon Goods laden or to be laden homeward in ſuch a Ship till the Adventure ſhall likewiſe be landed.

Or elſe upon Goods out and in, with liberty to touch at all Ports as are mentioned in the Policy.

Johannes Locinius, l. 2. c. 5. §. 5, 6.

So likewiſe on Ships that go trading Voyages, as round to *Cadiz*; and that it ſhall be lawful after the Ship's delivery there, to take in at the ſame Port another Cargo, and with that proceed to the *Weſt-Indies* or other parts and back again to *Cadiz*, and from thence to *London*; this Policy being general and dangerous, ſeldom procures ſubſcriptions, or at leaſt very chargeable ones.

As Goods and Merchandize are commonly enſured, ſo likewiſe are the Ships Tackle and Furniture; but in regard there ſeldom happens a Voyage but ſomewhat is miſſing or loſt, the *Premio* commonly runs higher than for Merchandize.

Sautor. p. 3. num. 13. ſeq. 43. ſeq.

Aſſurances may be made on Goods ſent by Land, ſo likewiſe on Hoys, and the like, and may be made on the heads of Men; as if a Man is going for the *Streights*, and perhaps is in ſome fear that he may be taken by the *Moors* or *Turkiſh* Pirates, and ſo made a Slave, for the Redemption of whom a ranſom muſt be paid, he may advance a *Premio* accordingly upon a Policy of *Aſſurance*; and if there be a Caption, the Aſſurer muſt anſwer the Ranſom that is ſecured to be paid on the Policy.

Liſle ver Sedgwick, Mich. 29 Car. 2. in B. R.

V. Thoſe *Aſſurances* are moſt dangerous when there are theſe words inſerted, *loſt or not loſt*; which is commonly done when a Ship hath been long miſſing, and no Tidings can be had, the *Premio* (eſpecially in time of War) will run very high, ſometimes 30 or 40 *per Cent.* and though it happens at the time that the ſubſcription is made, the Ship is caſt away, yet the Aſſurers muſt anſwer.

But if the Party that cauſed the *Aſſurance* to be made, ſaw the Ship wreckt, or had certain Intelligence, ſuch ſubſcription will not oblige, the ſame being accounted a meer fraud.

Locinius, lib. 2. cap. 5. § 9, 10.

Arthur Stockden's Caſe.

So likewiſe if the Aſſured, having a rotten Veſſel, ſhall aſſure upon the ſame more than ſhe is worth, and afterwards give order that going out of the Port, ſhe ſhould be ſunk or wreckt, this will be fraudulent, and not oblige the Aſſurers to anſwer.

Mich. 26 Car. 2. in B. R. Afterwards convicted by Information for the fraud.

A Merchant having a doubtful Account of his Ship, inſuresher, without acquainting the Inſurers of her Danger; Chancery relieved againſt the Policy of this fraudulent Inſurance.

2. P. Williams 170.

T In

In the Year 1678. one *Nownham Perkins* and *Stoakes* were Owners of a Veſſel called the *May-Flower* Ketch, the Veſſel coming laden with Wines on the account of *Fierbraſſe* and *Stone*, to the *Iſle of Wight*; *Perkins* being then in the ſame Place, contrives with one *Ivy* the Maſter to ſell the Freighters Goods privately, and that being effected to go out to Sea ſome ſmall diſtance from the Iſle, and there privately ſink the Veſſel, and pretend ſhe ſtruck, and then foundred by the Extremity of Weather. The Plot being laid, *Perkins* haſtens up to *London*, and makes a Policy of *Aſſurance* on the Veſſel; which being done, remits his Orders to *Ivy* to put in Execution the contrivance, who accordingly, the Goods, or the beſt of them, being diſpoſed of, ſtands out to Sea, and then with his own Hands, by the Force of an Iron Crow, makes a hole in the Hold, and then in his long Boat (the Crew perceiving the Veſſel to be ſinking) conveys himſelf and Mariners aſhore; *Ivy* remits up advice of the loſs, and *Perkins* (as if he had never known any thing of the Matter) demands the Monies aſſured with great Confidence, and thereupon brings an Action for the ſame; but before the Cauſe came to a
Hill. 32. *Car.* 2. *B. R.* Tryal, *Fierbraſſe* and *Stone* bring Trover againſt *Perkins*, and thereupon the whole Practice came out, and a Verdict was had againſt the Defendant, with this further, That if *Perkins* would proceed on his Actions on the Aſſurance, he muſt expect that this practice and fraud of his, would totally poiſon his *Aſſurance*, and thereupon being well adviſed, never proceeded.

L. *Raymond*, 1349. The Inſurance was againſt the Barretry of the Maſter; the Breach aſſigned was, that the Ship was loſt by the Fraud and Neglect of the Maſter; this is well enough; it is the Meaning of the Words of the Policy; it is not neceſſary to uſe the very Words.

Ibid. 840. The Government laid an Embargo, ſeized a Ship, and converted her to a Fire-ſhip; the Inſurers are liable.

Ibid. *Holt C. J.* In Caſes of Deviation, the Inſurers are liable for Damages before the Deviation; and from the Time of the Deviation they are diſcharged.

VI. Beſides the two Corporations before-mention'd, there are ſeveral Offices near the *Royal-Exchange* for the aſſuring Ships and Merchandize, where many of the moſt eminent Merchants by their Subſcriptions ſubject them-

ſelves to the Payment each of a Sum certain, as 100 *l.* or more, at the *Premio* then current, which in the Policy is ſaid to be received, tho' it may be not actually paid: There uſed to be a Clauſe to deduct 10 *per Cent.* in Caſe of Loſs, and ſix *per Cent.* more was cuſtomarily abated on Account of prompt Payment. So that the aſſured received but 84 *l. per Cent.* But of late it is become much more frequent to ſtipulate for an Abatement of two *per Cent.* only, in which Caſe there is a proportional Advance of the *Premio.*

If an Aſſurer pays his Money, believing the Ship to be loſt when it is not, he may bring an *Aſſumpſit* for the Money. Cited to be adjudged, *Salk.* 22. *pl.* 2.

VII. The *Policies* now adays are ſo large, that almoſt all thoſe curious Queſtions that former Ages, and the Civilians according to the Law Marine, nay and the common Lawyers too, have controverted, are now out of debate; ſcarce any misfortune that can happen, or proviſion to be made, but the ſame is taken care for in the Policies that are now uſed; for they enſure againſt Heaven and Earth, ſtreſs of Weather, Storms, Enemies, Pirates, Rovers, &c. or whatſoever detriment ſhall happen * or come to the thing enſured, &c. is provided for.

Ut quæ, in naves impoſuiſſent, ab hoſtium tempeſtatiſque vi publico periculo eſſent. Negotiatoribus certe lucra propoſuit ſuſcepto in ſe damno, ſi cui quid per tempeſtates accidiſſet, Livius, *lib.* 23. *cap.* 25. *Vide* Zeſius *in Commentario ad digeſta tit. pro Socio, num.* 25.

* *Sub nomine periculi, de quo ſit cautio, comprehenditur omnis caſus qui accidit in mari, à tempeſtate, ab hoſtibus, prædonibus, repriſaliis, ut vocant arreſtis aliiſque modis uſitatis & inuſitatis citra fraudem & culpam contrahentium, aut domini mercium vel navis.* Grotius *de Jure Holl. part.* 24.

But a Policy againſt Reſtraint of Princes, will not extend to Practices againſt the Laws of Countries, to a Seizure for not paying Cuſtom and the like. *2 Vern.* 176.

A Man lent Money on a Bottomry-Bond, and inſured the ſame Money on the Ship; ſhe out-lived the Time in which the Bond came due, and then was loſt; he recovers on the Bond; Chancery would not ſuffer to recover on the Policy alſo, but decreed it to be delivered up. *Equ. Abr.* 371, and *2 Vern.* 269.

But where the Inſurance was larger as to the Voyage, than the Bottomry-Bond, and the Ship was loſt, Chancery would not intermeddle. *2 Vern.* 717.

Where the Aſſurance is Intereſt or no Intereſt, what Chancery will do, See 2 *Vernon* 716.

Locinius, lib. 2. *cap.* 5. §. 7. 9, 10.

VIII. If a Merchant enſures ſuch a Ship generally, and in the Policy it is expreſſed of ſuch a Burthen, the Ship happens then to be laden and after miſcarries, the Enſurer ſhall not anſwer for the Goods, but only for the Ship.

It matters not in the Policy whether the particular Wares and Goods are named, but generally upon the Principal Wares, and all other Commodities laden or to be laden for the Enſured, or for his Account, or for any other.

IX. If a Ship be Enſured *from the Port of Londan* to *Cadiz*, and before the Ship breaks Ground, takes Fire, and is burnt, the Aſſurers in ſuch a caſe ſhall not anſwer, for the Adventure begun not till the Ship was gone from the Port of *London*; but if the Words had been, *at and from the Port of London*, there they would upon ſuch a misfortune have been made liable.

Note, The Port of *London* extends from the *North Foreland* in the Iſle of *Thanet*, over in a Line to the *Naſe* in *Eſſex*, and from thence to *London*-Bridge, *Rot. Scaccar.* 19. *Car.* 2.

If ſuch an *Aſſurance* had been from *London* to *Cadiz*, and the Ship had broke Ground, and afterwards been driven by Storm to the Port of *London*, and there had took Fire, the Enſurers muſt have anſwered; for the very breaking of Ground from the Port of *London* was an Inception of the Voyage.

7 *H.* 6. 14. *in Quare impedit*, 5 *B.* 2. Tryal 54. 34 *H.* 8. tit. 107. *Mich.* 30, 31. *Eliz.*

On the other hand, if a Man at *Cadiz* enſures a Ship from thence to *London*, if a loſs happens, the Aſſurer, if he comes into *England*, ſhall anſwer by the *Common Law*; for though the place where the Subſcription was made, and the *Premio* given was in a Foreign Country, yet that is not material, for the Action that is brought is grounded on the Promiſe, which is tranſitory, and not local, and ſo it was adjudged where the Defendant in conſideration of 10 *l.* had enſured, that if the Plaintiff's Ship and Goods did not come ſafe to *London*, he would pay 100 *l.* afterwards the Ship was robb'd on the Sea, and in an Action brought for the 100 *l.* the Plaintiff had Judgment, notwithſtanding the Robbery or Loſs was on the main Sea, and the Subſcription out of the Realm.

Salk. 444. *Straacha* 806, cited in *Show.* 325. * That has been much doubted, and

X. If after a Policy of *Aſſurance*, a damage happens, and afterwards in the ſame Voyage a Deviation; yet the Inſured ſhall recover for what happened before the Deviation, for the Policy is diſcharged from the Time of the Deviation only.

XI. If Goods are Enſured in ſuch a Ship, and afterwards

wards in the Voyage it happens ſhe becomes leaky and crazy, and the *Super-Cargo* and Maſter by conſent become Freighters of another Veſſel for the ſafe delivery of the Goods; and then after her relading, the ſecond Veſſel miſcarries *, the Aſſurers are diſcharged: But if there be theſe words, *The Goods laden to be tranſported and delivered at ſuch a place by the ſaid Ship, or by any other Ship or Veſſel until they be ſafely landed*, then the Enſurers muſt anſwer the misfortune.

Opinions of the Court have generally inclined againſt the Aſſurers. *Leg. ult. ad Rhod. Digeſt. Paulus. lib.* 14. *tit.* 2. §. 10.

XII. If a Man Enſures 5000 *l.* worth of Goods, and he hath but 2000 *l.* remitted, now he having enſured a real Adventure, by the Law Marine all the Aſſurers muſt anſwer *pro rata*, if a loſs. But by the Opinion of ſome, only thoſe firſt Subſcribers who under-writ ſo much as the real Adventure amounted to, are to be made liable, and the reſt remitting their *Premio* (10 *s. per Cent.* deducted out of the ſame for their Subſcriptions) are to be diſcharged.

Vide Grot. Introd. Jur. Holl. 212. 23. And indeed is more the Cuſtom of Merchants than Law.

On a Policy of Inſurance on Goods by Agreement valued at 600 *l.* and the Inſured not to be obliged to prove any Intereſt, the *Lord Chancellor* ordered the Defendant to diſcover what Goods he put on board; for although the Defendant offered to renounce all Intereſt to the Inſurers; yet referred it to a Maſter to examine the Value of the Goods ſaved, and to deduct it out of the Value or Sum of 600 *l.* at which the Goods were valued by the Agreement.

2 *Vern.* 716.

Debt upon Obligation with Condition, to pay ſo much Money, if a Ship returned within ſix Months from *Oſtend* in *Flanders* to *London* (which was more by a Third part than the Legal Intereſt of the Money) and if ſhe do not return then the Obligation to be void: The Defendant pleaded that there was a corrupt Agreement between him and the Plaintiff, and that at the time of making of the Obligation that he ſhould have no more for Intereſt, than the Law permits, in caſe the Ship ſtould ever return, and avers that the Bond was entred into by Covin to avoid the Statute of Uſury. *Per Hale*, clearly this Bond is not within the Statute, for this is the common Way of Aſſurance, and if this were void by the Statute of Uſury, Trade would be deſtroyed, for it is a caſualty whether ever ſuch Ship ſhall return or not, but he agreed the

Averment was well taken, becauſe it diſcloſed the manner of the Agreement. *Hardres* 418. *Joy* againſt *Kent*.

To depart with Convoy. 1 *Show.* 320. 4 *Mod.* 58. 3 *Lev.* 320. *Salk.* 443.

Action upon the caſe, upon a Policy of Aſſurance of Goods from *London* to *Naples*; the Adventure was to begin in time of the Lading at *London* (dangers of the Sea only excepted) with this Clauſe, *warranted to depart with Convoy*; the Ship departed with Convoy, but was ſeparated from the Convoy, by ſtreſs of Weather, and put into *Torbay*, and was there detained by contrary Winds; afterwards the Maſter of the Ship expecting to meet the Convoy, departed out of the Harbour, but could not meet the Convoy, being hindred by ſtreſs of Weather, the Ship was taken by the *French*. Judgment *pro Quer'*.

Salk. 445.

Caſe upon a Policy, which was to inſure the *William Galley*, in a Voyage from *Bremen* to the Port of *London*, *warranted to depart with Convoy*: The caſe was, the Galley ſet ſail from *Bremen* under Convoy of a *Dutch* Man of War to the *Elb*, where they were joined with two other *Dutch* Men of War, and ſeveral *Dutch* and *Engliſh* Merchant Ships, whence they ſailed to the *Texel*, where they found a Squadron of *Engliſh* Men of War and an Admiral; after a ſtay of nine Weeks, they ſet out from the *Texel*, and the Galley was ſeparated in a Storm, and taken by a *French* Privateer, taken again by a *Dutch* Privateer, and paid 80 *l.* Salvage. And it was ruled by *Holt* C. J. That the Voyage ought to be according to Uſage, and that their going to the *Elb*, tho' in Fact out of the Way, was no Deviation; for till after the Year 1703. there was no Convoy for Ships directly from *Bremen* to *London*: And the Plaintiff had a Verdict. *Bond* v. *Gonſalſe*, *February* 14. 1704. *coram Holt C. J.* at *Niſi Prius* at *Guildhall*.

Warranted to depart with Convoy has been reſolved to import, by the Uſage of Merchants, a Continuance with that Convoy as long as may be. *Lucas*'s Reports 287.

Locin. l. 2. *c.* 5. §. 9. And by the Laws of *Antwerp* there is a time allotted after the Ship's arrival at her Port how

XIII. A Merchant Enſures his Goods from *London* to *Sallee*, and there to be landed; the Factor, after arrival, having Opportunity, ſells the Cargo aboard the ſame Ship without ever unlading her, and the Buyer agrees for the Freight of thoſe Goods for the Port of *Venice*; before ſhe breaks Ground the Ship takes Fire, the Aſſured and Buyer are abſolutely without remedy; for the Property of the

Goods

Goods becoming changed, and Freight being contracted *de novo*, the ſame was as much as if the Goods had been landed. long the Adventure is to be born by the Enſurers, which is about 15 days.

And ſo it is if the Factor after her arrival had contracted for Freight to another Port, and the Ship had happened to take Fire, the Aſſurers are hereby abſolutely diſcharged for ever. *Art.* 13. *Aſſecur Antwerp.*

XIV. If a Ship be Enſured from *London* to and blank being left by the Lader to prevent her ſurpize by the Enemy, in her Voyage ſhe happens to be caſt away, though there be private Inſtructions for her Port, yet the Enſured ſit down by the loſs, by reaſon of the uncertainty. So a Blank is left in the Policy for the value of the Ship or Lading, if a loſs, and there be not words that may ſupply, the Enſured may endanger the Policy. Caſe of Monſieur *Gourdan* Governor of *Cales*, *Anno* 1585.

A taking of a Ship (that is inſured) by Pirates is to be underſtood, the Perils of the Sea. *Stiles* 132. 2 *Rolls* Abr. 248.

Where Goods are redeemed from a Pirate, contribution muſt be paid by all, becauſe the Redemption is made for the ſafety of all; but if the Pirate be once Maſter of all, and yet take but ſome ſpecial Goods; whether from Ship or Merchant, and not as a Contentation for ſparing of the reſt, in this caſe, becauſe the Remainder is not aſſured thereby, but freely ſpared, no Contribution is to be made for the taken Goods to charge any Aſſurer with any part thereof. So Contribution ſhall be made for Goods ſpoiled by wet, or other accident. Again if it be needful to lighten a Ship for her eaſier entry into Harbour or Channel, two parts of the Loſs fall upon the Goods, and the third upon the Ship; unleſs the Ship is more worth than the Lading, and the charge of the Goods be not the Cauſe of her inability to enter, but ſome bad quality proceeding from the Ship itſelf, or that otherwiſe it be provided in the Charter-party. *Lex Mercat.* 109.

XV. After notice of Loſs, the Enſured, (if he doth think fit) for that he hath Enſured the moſt of his Adventure, or that he would have the aſſiſtance of the Aſſurers; when there is hope of Recovery of the Adventure, he may then make a Renunciation of the Lading to the Aſſurers, then he comes in himſelf in the nature of an Enſurer, for ſo *Loccinius*, *l.* 2. *c.* 5. §. 8.

ſo much as ſhall appear he hath born of the Adventure beyond the Value enſured.

But if the Merchant ſhall not renounce, yet there is a power given in the Policy for him to travel, purſue, and endeavour a Recovery (if poſſible) of the Adventure after a misfortune to which the Aſſurers are to contribute, the ſame being but a trouble to give eaſe to the Aſſurers.

If prohibited Goods are laden aboard, and the Merchant enſures upon the general Policy, which always contains theſe words: *Of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettezons, Letters of Mart, and Countermart, Arreſts, Reſtrainments and Detainments of Kings and Princes, and all other Perſons, Barretry of the Maſter and Mariners, and of all other Perils, Loſſes, and Misfortunes whatſoever they be, and howſoever they ſhall happen to come, to the hurt and detriment of the Goods and Merchandize, or any part or parcel thereof*; whether if ſuch Goods be lawfully ſeized as prohibited Goods, the Enſurers ought to anſwer? It is conceived they ought not; and the difference hath been taken, where Goods are lawful at the time of Lading to be imported into that Country, for which they are conſigned for; but by matter *ex poſt facto* after the lading they become unlawful, and after arrival are ſeized, there the Aſſurers muſt anſwer, by virtue of the Clauſe, *And all other Perils*, &c. But if the Goods were at the time of lading unlawful, and the Lader knew of the ſame, ſuch Aſſurance will not oblige the Aſſurers to anſwer the loſs; for the ſame is not ſuch an Aſſurance as the Law ſupports, but is a fraudulent one.

In hoc contractu bona fide verſandum eſt, ut natura ultro citroque obligationis poſtulat. Locinius, *lib. 2. cap.* 5. § 8.

A Policy was made from *Cadiz* to *Vera Cruz* in *New Spain*, upon Monies lent upon Bottomry, and upon any kind of Goods and Merchandize whatſoever loaden aboard the Good Ship called the *Nouſtra Seignora del Carmen* and *Mary Magdalen*, the Adventure beginning immediately from the lading before a day to come, and the Monies from the time they were to be lent, and ſo to continue from *Cadiz* to *Vera Cruz*, and after Delivery, with Proviſo to ſtay at any Port or Place in her Voyage, and likewiſe to touch at *Porto Rico*, and there to lade and unlade without any Prejudice to the Enſurance, the Cargo being valued at 1700 *l. Sterl.* without Account, *&c.* againſt

againſt *Seas*, *Men of War*, *Fires*, *Enemies*, *Pirates*, *Rovers*, *Thieves*, *Jettezons*, *Letters of Mart and Countermart*, *Surprizals at Sea*, *Arreſts*, *Reſtraints and Detainments of all Kings*, *Princes*, *and People*, *of what Nation*, *Condition or Quality ſoever*. The Ship being laden at *Cadiz*, did depart towards *Vera Cruz*, and before arrival there, touching at *Porto Rico*, the Goods were there ſeized and arreſted. In an Action brought upon the Policy, the Defendant came in and pleaded, That the Ship at her arrival in her Voyage at the Port of *Rico*, was laden with Goods and Merchandize prohibited, and the ſame, and alſo the Ship, did there become forfeited by Default of the Proprietors, and was there ſeized and taken. The Queſtion was, if the Owners ſhould enſure, and then order prohibited Goods to be laden, whether that an Arreſt upon the ſame ſhould entitle them to a Recovery? The ſecond Objection was, If (as the Defendant had pleaded this Plea) the ſame were good? As to the firſt, the Court did all incline, that the Enſurance ought to be *bona fide*, *i. e.* the Reſtraint ought to be of ſuch Goods as by Law were not reſtrainable; but ſurely that cannot be, for the Intention of Policies are to warrant the Perils of all manner of Goods in all manner of Caſes. So that if there be a loading *bona fide*, be it prohibited or not, the ſame in Caſe of Loſs ought to be anſwered, unleſs it were a fraudulent Contrivance: But to the ſecond, it was reſolved, That the Plea was inſufficient; for admitting the ſame ſhould not oblige the Enſurer, yet becauſe the Defendant did not ſhew that the Goods were laden either by the Enſured, or by their Factor or Order, otherwiſe the ſame ſhould not conclude them; for perhaps the Maſter or his Mariners, or a Stranger, might load them on Board without Order, ſo that upon the meer Inſufficiency of the Manner of Pleading, and not of the Matter, the Court gave Judgment for the Plaintiff.

Houbland v. Harriſon. Hill. 31, 32 Car. 2. B. R. Judg. in Paſch. ſeq.

Like Judgment was given againſt *Lethulier adſ. Houbland*, *Trin.* 32 *Car.* 2. *in B. R. Rot.* 168.

But if a Merchant will freight out Wool, Leather * and the like, or ſend out Goods in a Foreign Bottom †, and then make a Policy, the Ship happens afterwards to be taken, by Reaſon of which there becomes a Forfeiture of Ship and Lading, the Enſurers are not made ſubject to anſwer the Damage; for the very Foundation was illegal and fraudulent, and the Law ſupports only thoſe Aſſurances

* 12 *Car.* 2. *cap.* 32. 14 *Car.* 2. *cap.* 7.

† 12 *Car.* 2. *cap.* 18.

rances that are made *bona fide*; for if otherwiſe, and Men could be enſured againſt ſuch Actions, they would deſtroy Trade, which is directly to thwart the Inſtitution and true Intentions of all Policies.

Ritterſhuſ. ad leg. contract. 23. de Reg. jur. cap. 18. p. 236, 237. Stypman dicto locorum. 335.

But if Goods ſhould happen to be lawfully Enſured, and afterwards the Veſſel becomes diſabled, by reaſon of which they relade by conſent of the *Super-Cargo* or Merchant, into another Veſſel, and that Veſſel, after arrival, proves the Ship of an Enemy, by reaſon of which the Ship becomes ſubject to Seizure; yet in this Caſe Enſurers ſhall anſwer, for that this is ſuch an Accident as is within the Intention of the Policy.

Several Men lade aboard Salt, without diſtinction, not putting them in Sacks, and the like; the Ship arrives, the Maſter delivers to their Principals according to their Bills of Lading as they come one by one, it falls out that ſome of the Salt is waſh'd or loſt by reaſon of the Dampneſs of the Ship, and that the two laſt Men cannot receive their Proportion. There are in this Caſe theſe things to be conſidered:

1. Whether the Maſter is bound to deliver the exact Quantity?
2. Whether thoſe that have received this Loſs can charge the Aſſurers?
3. Whether the Aſſurerers can bring in the firſt Men for a Contribution, they having their Salt delivered to them compleatly?

Hill. 11 Jac. in C. B. Laſtow and Tomlinſon's Caſe, Hobart, fol. 88. Leg. quod. convenit de verb. ob.

Certainly the Maſter is not bound to deliver the exact Quantity, nor is he obliged to re-deliver the very ſpecifical Salt, but only as Men are to repay Money or Corn by the diſtinction in a Bag or Sack, and out of them; but if the Fault was in not pumping, keeping dry his Deck, and the like, there *è contra*: Though perhaps there may be ſpecial Agreement.

Beſides, this is a Peril of the Sea which the Maſter could not prevent, and of neceſſity he muſt deliver to one firſt before another.

As to the ſecond, It is no Queſtion but that the Aſſurers ſhall anſwer. But whether they ſhall bring in the firſt Men for Contribution, may be ſome doubt.

D. Leg. in nonare.

It has been conceived by ſome, that they ought not; for they delivered their Salt to the Maſter *tanquam in Creditum*,

Creditum, and were not to expect the redelivery of the ſame ſpecifical Salt.

But by others it has been conceived they ought to contribute *pro ratione*; for as Goods of neceſſity, ſome muſt be ſtowed in the Hold, and that ſuch Goods ſeldom eſcape the Peril of the Sea; ſo the reſt muſt of neceſſity contribute to that Misfortune, and ſo make no Diſtinction.

The Bills of Lading are very uſeful to ſettle the Difference between the Aſſurer and Aſſured, of which there are three Parts, one ſent over Sea, the other left with the Maſter, and the laſt remaining with the Lader.

CHAP. VIII.

Of Priſage and Butlerage.

I. *What* Priſage *is, and where taken, and of what.*
II. *Merchant Strangers exempted from the ſame.*
III. *When due, and the exemption of the Citizens of* London *from the ſame.*
IV. *What Citizens are capable, and where not.*
V. *A Foreigner imports and makes a Citizen Executor and dies; whether he ſhall have the Benefit of the Immunity.*
VI. *Where a Foreigner ſells to a Citizen before Bulk be broken, the Vendee ſhall be chargeable.*
VII. *Where a Grant to diſcharge a particular Ship ſhall be good; and where a Grant to particular Perſons ſhall be otherwiſe.*
VIII. *Of* Butlerage, *what, and who are exempted.*
IX. *Where the King becomes entituled to theſe Duties.*
X. *A Grant to be free of all Cuſtoms, Impoſitions, &c. extends not to* Priſage *and* Butlerage.
XI. *Cinque Ports exempted from* Priſage.

I. PRiſage is a certain taking or purveyance for Wine to the King's uſe; the ſame is an antient Duty which the Kings of *England* have, time out of mind, had and received; the manner hath been by taking of every Ship or Veſſel that ſhould come into this Realm, if ten Tuns, to have for Priſage one Tun: And if it contain twenty Tuns or more, to have two Tuns, (*viz.* one Tun before the Maſt, and the other behind the Maſt) paying 20 *s.* for each Tun. This antient Immunity they have enjoyed as a Flower of the Crown, and by ſome has been conceived not grantable away without Act of Parliament. But yet in 6 *E.* 3. *fol.* 3. Caſe 15. mentions the ſame to be grantable over.

Dyer 92, 42, 165. *Fleta, l.* 2. *c.* 2. *Salk.* 617.

Such Wine may be taſted, and the fulleſt Veſſels may be taken for Priſage. And if a Ship has ten Tuns, then only one Tun is to be taken: and none if there be but nine Tuns; unleſs there be Evidence of Fraud. But if there be nine Tuns and an half, that is Fraud apparent; and then one Tun ſhall be taken.

Hard. 477.

II. King

II. King *Edward* the Firſt having laid ſome Impoſitions on the Merchants, which in *Anno* 25. of his Reign, being taken away, with promiſe, that neither he nor his Succeſſors ſhould do any ſuch thing without Aſſent of Parliament; in the one and thirtieth of his Reign they granted him an increaſe of Cuſtoms, in lieu of which he granted them many Immunities, as Releaſe of *Priſage*; &c. *Rot. Parl.* 31. *E.* 1. *cap.* 1, *&* 2.

III. *Priſage* is not due till the unlading, or that which is commonly called breaking of Bulk; for the Words are *De qualibet navi important vina, & diſonerant inde.* King *Edward* the Third by his Charter dated 6 *Martii Anno Regni Primo*, granted his Royal Charter of diſcharge to the Mayor, Commonalty, and Citizens of *London*, *in hæc verba*, (viz.) *Quod de vinis Civium nulla priſa fiant, ſed perpetuè inde eſſent quieti, &c.* which was afterwards allowed in the *Exchequer*. *Yelv.* 198. *Kenicot v. Bogan.*

IV. It is not every Citizen that is capable of this Privilege, but only thoſe that are reſident within the City: And ſo it was ruled in the Caſe of one *Knowles*, who being a Citizen and free Grocer of *London*, removed his Houſhould *cum pannis*, and did dwell at *Briſtol*, but yet kept his Shop in *London*; and a Ship of his arriving with Wines at *London*, and being unladen, the Priſage was demanded; he claimed the Benefit of diſcharge. It was adjudged, he was not capable of the ſame: For he that will claim the benefit of his diſcharge ought to be *Civis & Incola commorans*. 4 *H.* 6. *Knowle's* Caſe. 3 *Bulſtr.* 4.

By 24 *H.* 6. (a private Act of Parliament) Complaint was made, That the Lord Mayor of *London* would make Strangers Citizens; It was there declared, that this benefit to be diſcharged from Payment of *Priſage*, did not extend to ſuch Citizens as were *donati*, made free, but unto thoſe Citizens only which *commorant*, *incolant*, and are reſident in the City. 3 *Bulſtr.* 4, 5.

V. If a Foreigner brings a Ship laden with Wines, into the Port of *London*, and then makes a Citizen his Executor and dies, he ſhall not have the benefit of this Immunity from Payment of *Priſage* for theſe Wines, for that they are not *bona Civium*. 3 *Bulſtr.* 3.

VI. If a Foreigner arrives with a Ship laden with Wines at a Port with an intention to unlade, and before the 3 *Bulſtr.* 10.

the Goods are entred, or Bulk is broken, he ſells them to a Citizen, *Priſage* ſhall be paid notwithſtanding, for it was never the Intent of the King in this his Grant to diſcharge a Citizen in ſuch a manner.

3 Bulſtr. 10, 11. VII. If the King does diſcharge ſuch a Ship of *J. S.* being at Sea, particularly naming the ſame, from the Payment of *Priſage*, and he dies before the Ship arrives, no Duty can be demanded.

Hanger's Caſe, *Calibr. Rep.* 33. *3 Bulſtr.* 1. *1 Ro.* 138. But it has been held, if a particular Perſon has a Grant to him to be diſcharged of his Goods, and he dies before the arrival, the Duty ſhall be paid.

Vide the Caſe at large for the Court was divided in Opinion.

Bro. tit. diſclaimer, *fol.* 47. *3 Bulſtr.* 15. *6 Ed.* 3. *fol.* 5, 6. Archbiſhop of *York's* Caſe. *Quo Warranto's* were brought againſt three Archbiſhops of *York*, to ſhew cauſe why they demanded to have *Priſage* for Wines brought into the Port of *Hull*: The two firſt pleaded to have only the firſt taſte, and a preemption after *Priſage* paid; but the third pleaded a Charter of 15 *E.* 2. by force of which he claimed the ſame; and ruled not good. But though the Charter might be good, yet it was held in that caſe, a diſclaimer by the Predeceſſor ſhould bind the Succeſſor. Note, the Duke of *Ormond* in *Ireland* had an Inheritance in the Priſage of Wines by the King's Charter. But the ſame was forfeited. 2 *G.* 1.

Sir *John Davies* in the Caſe of Cuſtoms.

VIII. *Butlerage* is a Cuſtom due from Merchant-Strangers of 2 *s.* upon every Tun of Wine brought into this Realm by them; but *Engliſhmen*, pay it not.

King *John* granted to the Merchants of *Aquitain* trading for Wines thence into *England*, divers Liberties, and amongſt others, *Libertatibus conceſſis Mercatoribus vinetariis de Ducatu Aquitaniæ reddendo Regi & heredibus ſuis* 2 s. *de quolibet dolio vini ducti per eoſdem infra Regnum Angliæ vel poteſtatem Regis.*

In libro Rubro in Scaccario Remem. fol. 265. *Rot. Chartarum, Anno* 31. *E.* 1. *num.* 44. called *charta Mercatoria.* See the Charter at large in the Chapter of Cuſtoms. All Merchants Strangers in conſideration of the Grant to them by the King of divers Liberties and Freedoms, *Conceſſerunt de quolibet dolio vini quod adducent vel adduci facerent infra Regnum, &c. ſolvent nobis & heredibus noſtris nomine Cuſtumæ duos ſolidos, &c.*

1 H. 8. *c.* 5. *2 Ed.* 6. 22. It is called *Butlerage*, becauſe the King's chief Butler doth receive it. If any Perſon free of *Priſage* or *Butlerage* cuſtoms

cuſtoms Wines of a Perſon not free of *Priſage* or *Butlerage*, he forfeits double the Value of the *Priſage* of the Wines ſo cuſtomed.

By *Stat.* 1. *H.* 8. *ch.* 5. Making falſe Entry to defraud the King of *Priſage* and *Butlerage*, infers a Forfeiture of double the Value. And by *Stat.* 2. and 3 *Ed.* 6. *ch.* 22. of the Offender's Goods and Chattels, provided the Proſecution be within three Years. One Moiety to the King, the other to the Informer.

IX. Breaking of Bulk is that which entitles the King to the Duty: For if a Merchant imports Wines to the Number of 20 Tuns, yet if he unlades but part, as nine or four Tuns, yet the King ſhall have the entire *Priſage*; and though the Cuſtom ſeems to declare, that the taking *muſt be as well before as after the Maſt*, yet is not the Officer tied to that Strictneſs but may take where he pleaſes; for two Tuns are the King's due; for otherwiſe he might be cozened, the Freighter perhaps lading other Commodities aboard after the Maſt.

Kenicot verſus Bogan, Yelverton 198. *Boynton's* Caſe, 3 Rep. 44. 10.

If there be but one Tun taken out, yet the duty muſt be paid: The reaſon is, for that otherwiſe the Officer ſhould be obliged to travel perhaps all over the Kingdom.

X. The King granted to a *Venetian* Merchant that he ſhould be quit, *de omnibus Cuſtumis, Subſidiis, & Impoſitionibus, & omnibus aliis denariorum ſummis debitis & ſolubilibus pro quibuſcunque Merchandizis importandis*; and that he ſhould be as free as the Citizens of *London*. In that caſe it was adjudged in the *Exchequer*, That by that Grant the King did not diſcharge him of *Priſage*, becauſe the Priſage was not ſpecially expreſſed in the Grant, although that the City of *London* were by a ſpecial Charter freed of Priſage.

Vouched in the Caſe of Cuſtoms in Sir *John Davies* Reports.

XI. The Cinque Ports are likewiſe diſcharged of *Priſage*; yet if a Citizen of *Salisbury* ſhould conſign Wines to be delivered and unladed at *Dover*, the bare Diſcharge of the Goods at that Port will not acquit the Importer from the Duty; for it is not the Party's Importation, but his Domicil that qualifies him for the Benefit of his Immunity.

Cl. 1 *E.* 1. *m.* 5.

Bulſtr. 3 *part fol.* 1.

CHAP.

CHAP. IX.

Of Pilots, Wharfage, Primage, Average, Lodmanage.

I. *Of the* Pilots'*s charge till the Ship is brought to her place or bed.*
II. *If the Ship is likely to miſcarry, what the Ships Crew may do at ſuch time.*
III. *Of ignorant Pilots their puniſhment, and if the Ship miſcarries, who ſhall anſwer.*
IV. *Of Wharfage, and where the Wharfingers ſhall anſwer, and where not.*
V. Primage *and* Petty Lodmanage *where due, and for what; and if the Ropes break, whether the Maſter, or Wharfinger ſhall anſwer.*
VI. *Petty* Average *where due, and for what, and Hat-money.*
VII. Lodmanage *where due, and for what.*

I. BY the Laws of *Oleron* after that the Pilot hath brought the Ship to ſure Harbour, he is no further bound or liable; for then the Maſter is to ſee her bed and to her lying, and bear all the reſt of her Burthen, Charge, and Danger, except that of the Act of God: So that before ſhe comes to her place or bed, and while ſhe is under the Pilot's charge, if ſhe or her Goods periſh, or be ſpoiled, the Pilot muſt make good the ſame.

Leg. Oleron, cap. 23. II. By the Laws of *Oleron*, if his fault is notoriouſly groſs, that the Ships Crew ſees an apparent Wreck, they may then lead him to the Hatches, and ſtrike off his Head; but the Laws of *England* allow no ſuch haſty Execution.

By the Laws of *Denmark*, an ignorant Pilot is to paſs thrice under the Ship's Keel.

The Maſter generally in the Charter-party covenants to find a Pilot, and the Merchant covenants to pay him his Pilotage.

III. But if a Ship ſhould miſcarry coming up the River, under the charge of the Pilot, it has been a Queſtion, whether the Maſter ſhould anſwer in Caſe of the inſufficiency of the Pilot; or whether the Merchant may have his remedy againſt both? It hath been con-

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ceived the Merchant hath his election to charge either; and if the Maſter, then he muſt lick himſelf whole of the Pilot.

IV. *Wharfage* is Money paid for landing Wines at a Wharf, or for ſhipping or taking in Goods into a Boat or Barge; they commonly keep Boats or Lighters of their own for the carrying out and bringing in of Goods, in which if a loſs or detriment happens, they may in ſome caſes be made liable. *22 Car. 2. c. 11. §. 21.*

An Action of the Caſe grounded on the Cuſtom of the Realm was brought againſt the Defendant, Maſter of a Wharf, for not ſafe delivering of Goods, *&c.* The Caſe appeared to be thus: The Maſter unladed a Bale of Silk into the Wharfinger's Lighter, and ſent part of his Mariners to convey it aſhore; it happened that the Goods were ſtole: The Queſtion was, Whether the Wharfinger or the Maſter ſhould anſwer? Upon a Trial at *Guildhall* before the Lord Chief Juſtice *Hale*, it was there ruled, That the Maſter was liable, and not the Wharfinger; for till they are landed, the Maſter hath them under his Power: But if Goods are to be ſent aboard, there if they miſcarry in their Paſſage, the Wharfinger muſt anſwer. *Randall verſus Hilton and Butler, Paſch. 26. Car. in B. R.*

V. *Primage* and *Petty-Lodmanage* is likewiſe due to the Maſter and Mariners for the Uſe of his Cables and Ropes to diſcharge the Goods, and to the Mariners for loading and unloading of the Ship or Veſſel; it is commonly about twelve Pence *per* Tun. *32 H. 8. 14.*

If the Ropes break in hoiſting of Goods out of the Ship into the Lighter or Boat, the Maſter muſt anſwer if the Goods be damnified or loſt. *Leg. Oleron, cap. 10.*

But if the Ropes break at the Crane in taking them out of the Lighter, (although till they are landed, they are not out of the Maſter's Cuſtody) yet the Wharfinger ſhall anſwer.

VI. *Petty Average* is another little ſmall Duty which Merchants pay to the Maſter, when they only take Tunnage over and above the Freight, the which is a ſmall Recompence or Gratuity for the Maſter's care over Lading; and in the Bills of Lading they are expreſſed after Freight, together with *Primage* and *Average* accuſtomed. Some conceive that the Average mentioned in the Bills, is that which is the Average or Contribution for loſſes.

The *French* Ships commonly term the Gratuity *Hat-money*, and our *Engliſh* Merchants pay it our Maſters over the Freight; it is ſometimes more, ſometimes leſs; two or three Pieces.

Roughton Artic. Enquiry, *fol.* 27, 28.

VII. *Loadſman*, is he that undertakes to bring a Ship ſafe through the Haven to the Key or Place of Diſcharge, and if through his ignorance, negligence, or other fault, he ſuffereth the Ship or Merchandize to periſh, an Action lies againſt him at the *Common Law*; and ſo by ſome conceived he may be puniſhed in the Admiralty, but not in both.

The Hire is called *Lodmanage*, the which the Pilot receives of the Maſter for conducting the Ship up the River, or into the Port to her convenient Bed.

Per Leg. Oleron, cap. 15.

If two Ships lie in a Harbour and the Anchor of one is feared may occaſion damage to the other, after requeſt and refuſal (and there be probable cauſe) the other may take up the Anchor, and let the ſame down at a further diſtance, and the ſame, if oppoſed or hindred and any damage happen thereby, they are to make full Satisfaction; ſo it is if they lay out an Anchor, and neglect the placing of a *Buoy* to the Anchor, and damage happen thereby, they are not only ſubject to be puniſhed in the Admiralty, but likewiſe to render ſatisfaction to the Party damnified.

Per Leg. Oleron, cap. 14.

If two Ships be in the River, and the one falls foul on the other, both being laden, by the Law Marine the Contribution is to be in Common, and to be equally divided and appraiſed half by half; but then the *Mariners* muſt ſwear there was no fault in them: For otherwiſe one that hath an old rotten Veſſel which he can no ways diſpoſe of, may ſo order the matter as to lay her in the way of a good Ship under Sail, ſo that the ſame may be anſwered in damage: But when the Contribution is made equal, then the Contrivance will be avoided; but at the *Common Law* there can be no ſuch Judgment, for one of them muſt be found guilty; and if ſo, he muſt anſwer the other's Damage, and for his own he may ſit down by the loſs.

CHAP.

CHAP. X.

Of Bills of Exchange.

I. *Of the Antiquity of* Exchange *by the* Hebrew *Law.*
II. *Of the Antiquity of* Exchange *by the* Romans.
III. *Of Exchanges by other Nations in imitation of thoſe People.*
IV. *Of the ſeveral ſorts of Exchanges, and of* Cambio commune.
V. *Of* Cambio *real, or Exchanges value for value.*
VI. *Of* Cambio ſicco, *or dry Exchanges.*
VII. *Of* Cambio fictitio, *or feigned Exchange.*
VIII. *Of the Exchanges uſed this day, and on what.*
IX. *How Exchanges are made, and upon Monies in* London.
X. *Monies paid generally, how repaid by Exchange, how an Action ſhall be brought for Guineas, or Foreign Coin.*
XI. *Of Bills of Exchange payable at ſingle uſance.*
XII. *Bills of Exchange at double or treble uſance, and of the cuſtomary uſances to certain places from* London *and* Amſterdam *to other places.*
XIII. *Of the nature of Bills of Exchange, and how eſteemed of by the Laws of* England.
XIV. *Bills drawn more than one, no prejudice to the Parties; and of the true meaſure of judging on Bills by Cuſtom.*
XV. *What amounts to an acceptance generally, and on refuſal where to be proteſted.* Indebitat. Aſſumpſit *upon a general acceptance.*
XVI. *All the Drawers are made liable; and whether the Party to whom the Money is made payable, is bound to procure an acceptance.*
XVII. *Proteſt, what is meant by the ſame; and where the ſame is neceſſary, and where not. Proteſt upon the Stat. of* 9 & 10 *Will.* 3. *cap.* 17.
XVIII. *Bill drawn on two Perſons, where the ſame is neceſſary, and where not.*
XIX. *One Factor ſerves a Company, where a Bill of his accepted by one of the Company, obliges the reſt, and where not.*
XX. *What words amount to an acceptance, and what not.*
XXI. *Where a Bill may be accepted for part, and what muſt be done with the Bill thereupon.*
XXII. *When a Countermand may legally be made, and when not.*
XXIII. *How the ſeveral Parties intereſſed in a Bill of Exchange are obliged and fettered to each other.*
XXIV. *How a collateral Security may be annexed to a Bill, when the time is elapſed, for non-payment.*
XXV. *Where the Proteſt is only neceſſary to be kept, and where that and the Bill muſt both be remitted.*
XXVI. *Bill loſt, what is neceſſary for the Parties intereſſed in ſuch caſe to act.*
XXVII. *Of blank Endorſements, the validity of the ſame.*

XXVIII. *A Bill once accepted, whether the ſame may be revoked; and whether it may be accepted to be paid at a longer time than is mentioned: And what Proteſts are then neceſſary to be made.*
XXIX. *Of Bills accepted for the honour of the Drawer, where the ſame ſhall oblige.*
XXX. *The time cuſtomary allowed for payment after failure of payment at the day.*
XXXI. *Of the Validity of ſpeedy Proteſts in relation to recover the money to be paid on the Drawer.*
XXXII. *Bill accepted, and before the day of payment the Acceptor is failing, what's neceſſary to be done in reference to the obtaining better Security.*
XXXIII. *Bills accepted for the honour of the Drawer, where turned into an Act, and remitted by him that gives honour to the Bill.*
XXXIV. *The Acceptor ready to pay, but the Party to whom made payable is dead, what is neceſſary.*
XXXV. *Cauſes general for a Proteſt, and where ſatisfaction to the deliverer diſcharges all Parties.*
XXXVI. *Of Exchange by way of Credit.*
XXXVII. *One pays a Bill before it be due, and the Party to whom the ſame was paid, fails, where he ſhall be anſwerable to the Drawer notwithſtanding.*
XXXVIII. *Of Bills aſſignable over according to the Cuſtoms of Merchants, what Operation in* England.
XXXIX. *Where an Averment is neceſſary of Defendant's being a Merchant.*

I. THE Exchange for Monies is of great Antiquity as well by obſervation of the *Hebrew* Cuſtoms, as thoſe of the *Romans.*

Upon the firſt of the Month *Adar*, Proclamation was made throughout all *Iſrael*, That the People ſhould provide their half *Shekels*, which were yearly paid towards the Service of the *Temple* according to the Commandment of *God*; on the 25th of *Adar*, then they brought *Tables* in the Temple, (that is, into the outward Court where the People ſtood) on theſe Tables lay the leſſer Coins which were to furniſh thoſe who wanted half *Shekels* for their Offerings, or that wanted leſſer pieces of Money in their payment for *Oxen*, *Sheep*, *Doves*, and the like, which ſtood there in a readineſs in the ſame Court to be ſold for *Sacrifices*; but this ſupply and furniſhing the People from thoſe *Tables* was not without an *Exchange* for other Money, or other things in lieu of Money, and that upon advantage: Hence all thoſe that ſat at the Tables were called chief *Bankers*, or Maſters of the *Exchange*.

Exod. xxx. 31.

Moſes Kotſenſes, printed at *Venice*, *An.* 1557. *de Siclis*, *fol.* 122. *Col.* 2.

II. By the *Romans* it is ſuppoſed to be in uſe upwards of 2000 Years, Monies being then elected out of the beſt

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of Metals to avoid the tedious Carriage of Merchandize from one Country to another: So other Nations imitating the *Jews* and *Romans*, erected Mints, and coined Monies, upon which the Exchange by Bills was deviſed, not only to avoid the danger and adventure, but alſo its troubleſome and tedious Carriages. *Alex. Gen. dier. lib. 5. cap. 39.*

III. Thus Kingdoms and Countries having by their Sovereign Authorities coined Monies, cauſed them to appoint a certain Exchange for permutation of the various Coins of ſeveral Countries, without any tranſportation of the Coin, but giving *par pro pari* or *value for value*, with a certain allowance to be made thoſe *Exchangers* for accommodating the Merchants.

IV. As Commerce became various, ſo Exchange numerous; but generally reduced to four, *Cambio commune*, *Cambio real*, *Cambio ſicco*, and *Cambio ficititio*.

Cambio commune, in *England* was thoſe that were conſtituted by the ſeveral Kings, who having received Monies in *England*, would remit by Exchange the like ſum to be paid in another Kingdom. *Edward* the Third, to aſcertain the Exchange, cauſed Tables to be ſet up in moſt of the general Marts or Ports of *England*, declaring the Values of all or moſt of the foreign Coins of thoſe Countries where his Subjects held Correſpondence or Commerce, and what allowances were to be made for having Monies to be remitted to ſuch Countries or Kingdoms. *Reg. Orig. 194. Stat. 5. R. 2. cap. 2. 3 H. 7. 6.*

V. *Cambio real*, was when Monies were paid to the Exchanger, and Bills were drawn, without naming the ſpecies; but according to the value of the ſeveral Coins, which two Offices afterwards were incorporated, and indeed was no more but upon payment of Monies here in *England* to be repaid the juſt value in Money in another Country, according to the Price agreed upon between the Officer and Deliverer to allow or pay for the Exchange of the Money, and the loſs of time. *18 E. 3. Acton Burnel.*

VI. *Cambio ſicco*, or dry Exchange, is when a Merchant hath occaſion for 500 *l.* for a certain time, and would willingly pay intereſt for the ſame; the Banker being deſirous to take more than the Statute gives, and yet would avoid the ſame, offers the 500 *l.* by Exchange

The Uſury was firſt introduced by the *Jews* here in *England*. *Vide Co.* 2. *Inſt. fol.* 506.

for *Cales*, whereunto the Merchant agrees; but the Merchant having no Correſpondence there, the Banker deſires him to draw his Bill, to be paid at double or treble uſance, at *Cales*, by *Robin Hood*, or *John a-Nokes* (any feigned Perſon) at the Price of Exchange then current; accordingly the Merchant makes the Bill, and then the Banker pays the Monies; which Bill the Banker remits to ſome Friend of his to get a Proteſt from *Cales* for Non-acceptance, with the Exchange of the Money from *Cales* to *London*, all which with Coſts, the Merchant is to repay to the Banker; ſometimes they are ſo conſcientious as not to make above 30 *per Cent*.

VII. *Cambio fictitio*, when a Merchant hath occaſion for Goods to freight out his Ship, but cannot well ſpare Money; the Owner of the Goods tells him he muſt have ready Money; the Buyer knowing his drift, it is agreed, That the Seller ſhall take up the Monies by exchange for *Venice*, or any other parts; but then the Merchant muſt pay for exchange, and re-exchange.

So likewiſe where the Merchant is become indebted to the Banker, they are contented to ſtay, the Merchant paying exchange and re-exchange; the which he will moſt certainly compel him to do.

3 & 4 *H.* 7. Theſe two laſt ways of grinding the Face of the generous Merchant was afterwards prohibited, but notwithſtanding it was found impoſſible to moderate the inequality of Exchanges, and to have value for value: So that at this day it ſeems to be a Cold that many an honeſt Man is apt to catch.

VIII. The juſt and true Exchange for Monies that is at this day uſed in *England*, (by Bills) is *par pro pari*, according to value for value; ſo as the *Engliſh* Exchange being grounded on the weight and fineneſs of our own Monies, and the weight and fineneſs of the Monies of each other Country, according to their ſeveral Standards proportionable in their valuation, which being truly and juſtly made, aſcertains and reduces the Price of Exchange to a ſum certain for the Exchange of Monies to any Nation or Country whatſoever: As for inſtance,

If one receives 100 *l.* in *London* to pay 100 *l.* in *Exeter*; this by the *par.*

But if a Merchant receives 100 *l.* in *London* to pay 100 *l.* at *Paris*, there the Party is to examine and compare the *Engliſh* weight with the weight of *France*, the fineneſs of the *Engliſh Sterling* Standard with the fineneſs of the *French* Standard; if that at *Paris* and that at *London* differ not in proportion, then the Exchange may run at one Price, taking the Denomination according to the Valuation of the Monies of each Country; but if they differ, the Price accordingly riſes or falls: And the ſame is eaſily known by knowing and examining the real fineneſs of a *French* 5 *s.* Piece and an *Engliſh* 5 *s.* Piece, and the difference which is to be allowed for the want of fineneſs or weight, which is the Exchange; and ſo proportionably for any Sums of Monies of any other Country, the which is called *Par*, or giving value for value.

But this Courſe of Exchange * is of latter Years abuſed, and now Monies are made a meer Merchandize, and does over-rule Commodities, and Monies riſe and fall in Price according to the Plenty and Scarcity of Money.

* And therefore ſome are of Opinion, that there can be no certain Rate ſet on the *Par* in Exchange, to anſwer juſtly the Value of the Coins of Foreign Parts, by reaſon of the Diverſity of them, and of their intrinſick Values. *Vide* Sir *Robert Cottons* Poſthuma, *fol.* 306.

IX. As Money is the common Meaſure of Things between Man and Man within the Realm, ſo is Exchange between Merchant and Merchant within and without the Realm; the which is properly made by Bills when Money is delivered ſimply here in *England*, and Bills received for the repayment of the ſame in ſome other Country, either within the Realm or without the Realm, at a Price certain, and agreed upon between the Merchant and the Deliverer. For there is not at this Day any peculiar or proper Money to be found in *ſpecie* whereupon out-land Exchanges can be grounded; therefore all Foreign Coins are called imaginary.

At *London* all Exchanges are made upon the Pound Sterling of 20 *s.* and 12 *d.* to the Shilling; for *Germany*, *Low-Countries*, and other Places of Traffick; and for *France* upon the *French* Crown: For *Italy*, *Spain*, and

ſome other Places, upon the Ducat: For *Florence*, *Venice*, and other Places in the *Streights*, commonly by the Dollar and Florin.

2 *Bulſt.* 53, 54. Note, in an Action on the Caſe upon a Bill of Exchange, it was ſaid in *Vernat* againſt *Debuſte*, Special Bail is not required in a Writ of Error by the Stat. of 3 *Jac.* 1. *cap.* 8. becauſe an Action upon the Caſe is not within that Stat. but only Actions of Debt; for had this 16, 17 *Car.* 2. *c.* 8. §. 3. been aided by 3 *Jac.* 1. there needed no proviſion by the Stat. of *Car.* 2. 2 *Keb.* 234.

X. Bills drawn to be paid, are either at ſight, or a time certain, ſingle, double or treble uſance, and are commonly about three, for fear of any miſcarriage.

The taking and delivering Money at ſight binds the taker up to give his Bill to pay at ſight, or within ſome ſhort time the like Sum after ſuch a Rate the Pound, Dollar, Ducat or Crown, as is agreed between them in Foreign Coin, either according to the Valuation of Monies, or current Monies for Merchandize.

See what Action and how ſhall be brought for Guineas, *Guineas, Foreign Coins.* *4 Mod.* 409. Foreign Coin, in *Pope* and *S. Leger*'s Caſe, 1 *Lutwytch* 414. 1 *Leon.* 41. *Wilſhalge* againſt *Davidge.* 3 *Cro.* 536. *Bagſhaw* againſt *Playn.* 2 *Cro.* 617. *Rands v. Peck. Latch*, 77, 84. *Ward*'s Caſe.

XI. The ſecond time of Payment is called *Uſance*; it is known or taken to be the Compaſs of one Month, to be computed from the date of the Bill, and that governed *Salk.* 135. according to the Cuſtom of the Place where thoſe Exchanges do run. For which Reaſon in an Action on a Bill of Exchange payable at Uſance, the Plaintiff muſt ſhew what the Uſance is.

XII. The third is double or treble *Uſance*, two or three Months: Sometimes there are Exchanges made upon half *Uſance*.

The times of Payment do alter the Price of Exchanges according to time.

Uſance

Uſance from *London* to	*Middleborough* *Amſterdam* *Antwerp* *Bruges* *Rotterdam* *Liſle* *Roan* *Paris*	And all *France*, *Flanders*, and *Holland*, is generally accounted one Month's time from the Date of the Bill.	The Bills may have a larger, ſometimes a ſhorter time, there is no direct certainty, but only that ſingle Uſance is a Month, double Uſance two Months, &c.
Uſance from *Amſterdam* to	*Rome* *Genoa* *Venice* *Naples* *Palermo* *Lucca* *Seville* *Lisbon*	And all *Italy*, *Spain*, and *Portugal*, is generally accounted two Months from the Date, &c.	
Uſance from *London* to	*Florence* *Venice* *Leghorn* *Zant* *Aleppo* *Lucca*	is ſometimes accounted treble Uſance from the Date of the Bill.	

XIII. *Excambium vel Cambium*, or as the Civilians term it, *Permutatio*; *Billa Excambii* ſignifies no more but a cuſtomary Bill, ſolemnized by numerous conſent of Traders, to have a Reſpect more than other Bills, though of as high and as intrinſical a Value: And thoſe that give ſuch Bills are called *Exchangers* or *Bankers*.

Though the Act was no more but to keep up the Life of Commerce, (without which it is impoſſible for any Nation to flouriſh) yet could not any Perſon draw ſuch Bills, or return Money beyond Seas, without Licence firſt obtained of the King. But at this day any Man may do it without being obliged to obtain ſuch leave. *Reg. Orig. fol.* 194. *Stat.* 5 *R.* 2. *cap.* 2.

Where there are two joint-Traders, and one of them ſubſcribes a Bill for himſelf and Partner it binds both. L. *Raym.* 175.

A Bill drawn upon B. requiring him to pay C. ſeven Pounds every Month, out of the growing Subſiſtence

ſiſtence of the Drawer, was adjudged to be no Bill of Exchange. *Lucas* 294. 316.

Note, There is not the ſame Strictneſs requiſite in penning of Bills current between Merchant and Merchant, as in Deeds, *&c. Lucas* 287.

There is no material Difference whether a Bill be drawn payable to *the Order of* A, or *to* A. *or Order:* For upon Acceptance, A. may maintain his Action in the one Caſe as well as the other. *Lucas* 286.

XIV. Such a Bill being drawn, they commonly take one or two more of the ſame date word for word, only this Clauſe is inſerted in the ſecond, *My firſt of the ſame Date, Perſons and Sum not being paid:* And in the third, *My firſt and ſecond of the ſame Date, and contents not being paid.*

L. Raymond 816.

The Declaration ought to aver that the ſecond and third are not paid (*& vice verſa* come ſemble) but this may be aided by Verdict, though ill upon a Demurrer.

Conſuetudo quandocunque pro lege ſervatur, ſaith *Bracton, in partibus ubi fuerit more utentium approbata; longævi enim temporis uſus & conſuetudinis non eſt vilis authoritas, lib.* 1. *cap.* 3.

The right Meaſure of judging on Bills of Exchange, is purely by the laudable Cuſtom often reiterated, by which means the ſame hath obtained the force of a Law, and not the bare and ſingle Opinion of ſome half-fledged Merchants: For Bills of Exchange are things of great Moment as to Commerce, and are neither to be ſtrained ſo high, as that a Man ſhould not caſt his eye on them, but the ſame ſhall be taken to be an *acceptance:* Nor on the other hand, having duly accepted them, the ſame ſhould be raſhly and unadviſedly avoided, by the ſhallow fancy of ſuch nimble-pated ſhufflers; but they are ſoberly judged and governed, as the ſame hath generally been approved of and adjudged of in former Ages.

XV. A Bill being remitted, the Party is to go immediately to the Perſon to whom the ſame is directed, and preſent the ſame in order to his acceptance; if it be tendred, and the Party ſubſcribes *Accepted*; or *Accepted by me A. B.* or being in the *Exchange* ſays, *I accept the Bill, and will pay it according to the Contents*; this amounts without all Controverſy to an Acceptance.

Words are made to ſignify things; by the word *Deliverer* is meant he that

But if the ſame be refuſed, the Party muſt then procure a *Proteſt*, and remit the ſame to the *Deliverer*, who is to reſort to the *Drawer* for Satisfaction for the principal, coſts, and damage.

The

pays the Money beyond Sea. By the word *Drawer*, he that writes or draws the Bill of Exchange; the Perſon upon whom, is called the *Acceptor*.

The Drawing a Bill of Exchange is an actual Promiſe. L. *Raymond* 538.

Acceptance after the Day of Payment paſt is uſual, and good. L. *Raymond* 364. 574. So Acceptance for the Honour of the Drawer. *Idem* 575.

Three Days of Grace are allowed upon Foreign Bills, unleſs the third Day be *Sunday* or *Chriſtmas-Day*, &c. and then only two Days. *Idem* 575, 743. No ſuch Cuſtom for inland Bills. *Idem* 743. Goldſmiths Notes to be received immediately. *Idem* 744, 757, 759, 774.

The queſtion whether a general *Indebitat. Aſſumpſit* will lie upon a bare acceptance of a Bill of Exchange, in the Argument of the Caſe of *Bellaſis* and *Heſter*. By Juſtice *John Powel*, a general *Indebitat. Aſſumpſit* does not lie on a Bill of Exchange; but it ought to be a ſpecial Declaration upon the Cuſtom of Merchants, as in the Caſe of *Brown* and *London*. 1 *Levinz* 298. 1 *Mod.* 285. 2 *Keble* 695, 731, 758, 822. 1 *Vent.* 152. In which Caſe, Judgment was arreſted after Verdict as reported by *Levinz* and *Ventris*. *Hard.* 485, 486. *Salk.* 125.

In the Caſe of *Bromwich* and *Lades*, it was ſaid by the Chief Juſtice *Treby*, that Bills of Exchange were of ſuch general Uſe and Benefit, that upon an *Indebitat. Aſſumpſit*, a Bill of Exchange may be given in Evidence to maintain the Action; and by Mr Juſtice *Powel*, that upon a general *Indebitat. Aſſumpſit*, for Monies received to the uſe of the Plaintiff, ſuch Bill may be left to the Jury to determine, whether this was for value received or not. In this Caſe the Declaration was on the Cuſtom of Merchants, and a general *Indebitat. Aſſumpſit* thereon. See the Declaration and Exceptions to it, in the ſaid Caſe of *Bellaſis* and *Heſter*, in 1 *Lutwych*, 1589.

By the Stat. of the 9th and 10th of *Will.* 3. *cap.* 17. It is enacted that after the 24th of *June* 1698. All Bills of Exchange drawn in, or dated at, and from any Place of this Kingdom of the Sum of 5 *l.* or upwards upon any Perſon in *London*, or any other trading City, Town or Place (in which Bills, the value ſhall be expreſſed to be received)

received) drawn payable at a certain time, after the Date thereof, may after acceptance in Writing, and the expiration of three Days after the ſame ſhall be due, be proteſted by a Notary Publick, or in default of ſuch Notary Publick, by any other ſubſtantial Perſon of the Place before two Witneſſes; refuſal or neglect being firſt made of due Payment; which Proteſt ſhall be made under a Copy of the Bill, in the form preſcribed by the Act, and ſhall be notified within 14 Days after, to the Party from whom the Bills were received, who (upon producing ſuch Proteſt) is to repay the ſaid Bills with Intereſt and Charges from the Proteſting; for which Proteſt there ſhall not be paid above 6 *d*. And in Default of ſuch Proteſt, or due Notice thereof, the Perſon ſo failing ſhall be liable to all Coſts, Damages and Intereſt thereupon. Provided that if any ſuch Inland Bills be loſt, or miſcarry within the time limited for Payment of the ſame, the Drawer of the ſaid Bills ſhall give other Bills of the ſame Tenor, Security being given to indemnify him, in Caſe the ſaid Bills ſo loſt or miſcarried be found again.

Salk. 128. 2 *Mod. Caſ.* 80.

A Writ of Error was brought on a Judgment by *Nil dicit* in an Action againſt the Drawer of an Inland Bill of Exchange; and it was objected, that ſince the Act of 9 *W.* 3. no Damages ſhall be recovered againſt the Drawer upon a Bill of Exchange without a Proteſt, and therefore the Action lies not, there being no Proteſt.

But *Holt* C. J. The Statute never intended to deſtroy the Action for want of a Proteſt, but only to deprive the Party of recovering Intereſt and Coſts upon an Inland Bill againſt the Drawer without Notice of Non-payment by Proteſt; for before the Statute there was this Difference between Foreign and Inland Bills of Exchange: If a Bill was foreign, one could not reſort to the Drawer for Non-acceptance or Non-payment without a Proteſt, and reaſonable Notice thereof; but in Caſe of an Inland Bill, there was no occaſion for a Proteſt, but if any Prejudice happened to the Drawer by the Non-payment of the Drawee, and that for want of Notice of Non-payment, which he to whom the Bill is made ought to give, the Drawer was not liable; and the Word *Damages* in the Statute, was meant only of

Damages

Damages that the Party is at by being longer out of his Money by the Non-payment of the Drawee, than the Tenor of the Bill purported, and not of Damages for the Original Debt: And the Proteſt was ordered for the Benefit of the Drawer; for if any Damages accrue to the Drawer for want of Proteſt, they ſhall be borne by him to whom the Bill is made; and if no Damages accrue to him, then there is no Harm done him, and a Proteſt is only to give formal Notice that the Bill is not accepted, or accepted and not paid; and if in ſuch Caſe the Damage amount to the Value of the Bill, there ſhall be no Recovery, but otherwiſe he ought not to loſe his Debt; but that ought either to appear by Evidence upon *Non Aſſumpſit*, or by ſpecial Pleading; and the Act is very obſcurely and doubtfully penn'd, and we ought not by Conſtruction upon ſuch an Act to take away a Man's Right. And the Judgment was affirmed *per totam Curiam*.

What Actions lie upon a Bill of Exchange, and how to be brought, and againſt whom. See *Hardreſs* 487. in *Scaccario*, and *Brown* and *London*'s Caſe, 1 *Mod.* 285, 1 *Levinz* 298. and 2 *Keble* 695. and the Caſe of *Cramlington* againſt *Evans* and *Percival*, 2 *Vent.* 307. L. *Raym.* 175, 364, 574.

Acceptance of a Bill of Exchange may be pleaded as Payment in Bar of an Action of Account. *Luc.* 37.

Where the Drawee firſt accepts and then ſuffers the Bill to be proteſted, he ſhall pay Intereſt from the Time of the Proteſt. *Lucas* 37.

If a Bill be accepted, and afterwards indorſed to the Drawer, he may maintain an Action as Indorſee, in Caſe he had Effects enough in the Hands of the Drawee, to anſwer the Bill: but it is otherwiſe where the Acceptance was only for the Honour of the Drawer. *Luc.* 37.

A. draws a Note upon a Goldſmith, and ſends his Servant to receive the Money, and inveſt it in Exchequer-Bills; the Servant gets *B.* to give him Money for the Note, and then brings the Exchequer-Bills to his Maſter, and two Days afterwards the Goldſmith fails; it was adjudged that *A.* muſt anſwer the Money to *B*: for the Property of the Note was not transferred to *B*, there being no Indorſement; and he could not have ſued upon it;

it

it was only in the Nature of a Pledge or Security to him. *Luc.* 109.

A Bill was drawn on the *York-Buildings Company*; one *Biſhop*, who was their Caſhier, accepts it without writing *for the Company*, or any thing to that Effect: An Action was maintained againſt him in his private and ſingle Capacity upon this Acceptance.

XVI. If there be ſeveral *Drawers* who ſubſcribe, all are liable in caſe of a Proteſt.

Nor is any ſuch thing as a three Days reſpite to be allowed for Acceptance.

If a Bill is drawn upon a Merchant in *London* payable to *J. S.* at double Uſance, *J. S.* is not bound in Strictneſs of Law to procure an acceptance, but only tender the Bill when the Money is due: But Merchants who generally have generous Spirits, will not ſurprize a Man; but firſt procure an Acceptance, or at leaſt leave the Bill for the Party to conſider and give his anſwer, and then give Advice of the ſame, and if the Money be not paid, then proteſt.

Note, the *Stat.* 3 & 4 *Ann. ch.* 9. having given like Remedy upon promiſſory Notes, as upon inland Bills of Exchange: it was reſolved that an Action lies by a ſecond Indorſee upon a Note, whereby the Defendant promiſed to be accountable to *J. S.* or order for 100 *l.* value received. L. *Raymond* 1396.

A Note value received *de premiſſis* in *Roſemary-lane*, was adjudged a good Note within the Statute. *Idem* 1545.

The Indorſee declared that the Defendant made his Note in writing, by which he promiſed to pay, *&c.* without ſaying that the Defendant ſigned it: This was held good, on Demurrer. *Idem* 1376, 1377. The like of a Bill. *Idem* 1542.

So where the Declaration ſhewed that the Defendant made it for himſelf and his Partner, and ſigned it; whereby he promiſed for himſelf and his Partner to pay, *&c.* *Idem* 1484.

A Bill need not to be expreſly averred to be drawn according to the Cuſtom of Merchants. *Idem* 1542.

An Action on a Note by which the Defendant and another promiſed jointly *or* ſeverally, is ill. *Idem* 1544, 1545.

XVII.

XVII. A Proteſt is no more but to ſubject the *Drawer* to anſwer in caſe of non-acceptance, or non-payment; nor does the ſame diſcharge the Party Acceptor, if once accepted; for the Deliverer hath now two Remedies, one againſt the *Drawer*, and the other againſt the *Acceptor*.

To entitle the Party to an Action at Law in *England* againſt the Acceptor, it matters not whether there be a Proteſt; but to entitle the Party to a recovery againſt the Drawer beyond the Seas or elſewhere, there muſt be a Proteſt before a Publick Notary.

If a Merchant hath accepted a Bill, and before the ſame becomes to be due, he proves inſolvent, or at leaſt his Credit is publickly blaſted, a Proteſt ought to go.

If a Merchant to whom the Bill is payable, be abſent, ſick or like to die, any Friend or Servant of his, may cauſe a Proteſt to be made.

A. draws a Bill upon *B.* to the uſe of *C.* and upon non-payment, *C.* proteſts the Bill, he cannot ſue *A.* unleſs he gives notice that the Bill is proteſted, for *A.* may have Effects of *B.* in his Hands, by which he may ſatisfy himſelf, 1 *Vent.* 45. 2 *Keb.* 584.

By the Statute 3, 4 *A. c.* 9. It is enacted, that if the Party on whom an Inland Bill of Exchange ſhall be drawn, ſhall refuſe to accept the ſame by under-writing it, the Party to whom the ſame is made payable may and ſhall cauſe ſuch Bill to be proteſted for Non-acceptance.

No Acceptance of ſuch Inland Bill of Exchange ſhall be ſufficient to charge any Perſon, unleſs the ſame be underwritten or indorſed in Writing thereupon; and if ſuch Bill be not accepted by ſuch under-writing or Indorſement, no Drawer ſhall be liable to pay any Coſts, Damages or Intereſt thereon, unleſs ſuch Proteſt be made for non-acceptance thereof, and within fourteen Days after ſuch Proteſt, the ſame be ſent, or Notice thereof be given to the Party from whom ſuch Bill was received or left in writing at the Place of his uſual Abode.

If ſuch Bill be accepted and not paid before the Expiration of three Days after the ſame ſhall become due, then no Drawer ſhall be compellable to pay any Coſts,

Damages, or Intereſt thereon, unleſs a Proteſt be made and ſent, or Notice thereof be given in manner abovementioned: Nevertheleſs, every Drawer ſhall be liable to pay Coſts, Damages and Intereſt, if a Proteſt be made for non-acceptance or non-payment and Notice thereof be ſent, given, or left as aforeſaid.

Such Proteſt is not neceſſary unleſs the Value be acknowledged in ſuch Bill to be received, and unleſs the Bill be drawn for 20 *l.* or upwards.

If any Perſon accepts ſuch Inland Bill of Exchange in Satisfaction of a former Debt, the ſame ſhall be eſteemed a compleat Payment of ſuch Debt, if the Perſon accepting ſuch Bill for his Debt doth not take his due Courſe to obtain Payment thereof by endeavouring to get the ſame accepted and paid, and make his Proteſt as aforeſaid.

Before this Statute the Declaration need not have ſhewn a Proteſt upon ſuch Bill, though the Drawer ought to have had convenient Notice of Non-Payment. L. *Raymond* 992, 993. But the Law ſeems to be altered, as to the Proteſt by this Statute.

An Inland Bill drawn to be paid out of a particular Fund, is not a Bill of Exchange. L. *Raymond* 1361, 1362, 1563.

Yet, Pay to *J. S.* or Order. 10 *l.* as my Quarter's Half-Pay by Advance, a good Bill of Exchange. *Idem* 1481.

Per Jaſonem in lege allegantur. ff. de conditionibus indebiti.

XVIII. A Bill drawn on two jointly muſt have a joint acceptance, otherwiſe it muſt be proteſted; but to two or either of them, *è contra.*

Then if the ſame be accepted by one, it is purſuant to the tenor of the Bill, and ought not to be proteſted but in caſe of non-payment; and in that caſe the Perſon Acceptor is liable to an Action, but if it be on joint Traders, an acceptance by one will conclude and bind the other.

Salk. 126. L. *Raymond* 175.

XIX. A Factor of the *Hamburgh*, *Turkey*, or *India* Company draws a Bill on the ſame, and a Member accepts the ſame, this perhaps may make him liable, but not another Member.

So it is if ten Merchants ſhall employ a Factor at the *Canaries*, and the Factor draws a Bill on them all, and one

one of them accepts the Bill, and then refuſes Payment; this will not oblige the reſt.

But if there be three joint Traders for the common Stock and Benefit of all three, and their Factor draws a Bill on them, the Acceptance of the one will oblige the reſidue of the Company. *Winch.* 24, 25. *Salk.* 126.

XX. A ſmall Matter amounts to an Acceptance, ſo that there be right underſtanding between both Parties: As *Leave your Bill with me, and I will accept it*; or, *Call for it to morrow, and it ſhall be accepted*; that does oblige as effectually by the Cuſtom of Merchants, and according to Law, as if the Party had actually ſubſcribed or ſigned it (which is uſually done.)

But if a Man ſhall ſay, *Leave your Bill with me, I will look over my Accounts and Books between the Drawer and me, and call to morrow, and accordingly the Bill ſhall be accepted*, this ſhall not amount to a compleat Acceptance: For this mention of his Book and Accounts was really intended to ſee if there were effects in his hands to anſwer, without which perhaps he would not accept of the ſame. And ſo it was ruled by the Lord Chief Juſtice *Hale* at *Guildhall.*

XXI. A Bill may be accepted for part, for that the Party upon whom the ſame was drawn, had no more Effects in his hands; which being uſually done, there muſt be a Proteſt, if not for the whole Sum, yet at leaſt for the Reſidue: However, after payment of ſuch part there muſt be a Proteſt for the Remainder.

The receiving of part of the Monies upon the Bill, does no ways weaken the Bills. *Trin.* 20. *Car.* 2. *in B. R.*

Before the time of payment of the Bill, the Party may notwithſtanding accept it, and pay it at the time of payment; or another may accept the Bill for the Honour of the Drawer, and if he pay it in default of the Party, yet before payment he is bound to make a Proteſt, with a Declaration that he hath paid the ſame for the Honour of the *Drawer*, whereby to receive his Money again.

XXII. Any time before the Money becomes due, the Drawer may countermand the payment, although the Bill hath been accepted.

Per leg. publi- in ſi ff. depoſi- ti & per Bart. ibidem, & per Romanum ſin- gulari, fol. 474.

The Countermand is uſually made before a Notary; but if it comes without, ſo it comes under the Party's hand, it is well enough.

If the Bill be accepted, and the Party deſires to have the Money before it be due, and it is paid, and then there comes a Countermand; it hath been conceived that it ought not to be allowed; for as he could not enlarge the time, ſo he could not ſhorten it, but his Duty is to follow his Order.

Bill payable to the Bearer. *Salk.* 125.

XXIII. *Aſſumpſit*, and declares on the Cuſtom of *London*, that if any Merchant or other Perſon merchandizing in *London*, make a Note in Writing under his Hand, and by this promiſeth to pay any Sum of Money to a Perſon in it named, or to the Bearer; and if the Perſon in the Note named, to whom by the Note it was promiſed to be paid, aſſign or deliver it to another Perſon for to receive the Money to his own uſe, and he carries this to the Drawer of the Note, and requeſts him to pay the Money to him, then the Perſon that made the Note, was chargeable to pay this to the Bearer. That the Defendant (being a Goldſmith) made ſuch a Note, by it promiſing to pay a 100 *l.* to *W. B.* or the Bearer; and that *W. B.* delivered the Note to the Plaintiff to receive the Money to his own uſe, in ſatisfaction of 100 *l.* due to him by the ſaid *W. B.* and that the Plaintiff carried it, and ſhewed it to the Defendant and requeſted him to pay the 100 *l.* which he had not done; by which by the Cuſtom he became chargeable, and ſo promiſed to pay. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment; that this Cuſtom to pay to the Bearer was too general: For perhaps the Goldſmith before notice by the Bearer had paid it to *W. B.* himſelf, as in truth he had; and of ſuch Opinion was the Court, *Horton verſ. Cogs*, 3 *Levinz* 299. where ſee the Pleadings.

Drawer and Indorſer.

(*a*) If the Plaintiff recover againſt the Drawer of a Bill (though he has no Execution upon it) he ſhall not afterwards recover againſt any of the Endorſers. See the Caſe at large, *Claxton* and *Swift*, 3. *Mod.* 86. *Skinner* 255.

(*a*) This Judgment was reverſed in the Exchequer Chamber, becauſe the Recovery, without Execution, was no Satisfaction. *Lutw.* 878, 882, *b.*

L. Raymond 180, 181.

If a Goldſmith's Note be drawn payable to *J. S.* or Bearer, the Bearer cannot maintain an Action for the Money, except in the Name of *J. S.*

Note,

Note, The Drawer is bound to the Deliverer, and the Acceptor to the Party to whom the Bill is made payable; yet both are not bound to one Man, unleſs the Deliverer be a Servant to the Party to whom the Money is made payable; or the Party to whom the Money is made payable be Servant to the Deliverer: Yet both Taker and Acceptor are liable till the Bill is paid.

XXIV. Therefore when you bring your Action, be ſure to draw your Declaration accordingly, and make the ſame part of the Cuſtom as you ſet it forth; for if you vary, you muſt expect to be nonſuited: And the Party is not bound to alledge a particular Place of Demand. *Styles* 370.

See L. *Raymond* 281. That the Day of Acceptance ſhall be included in the Days allowed for Payment, unleſs there be a Cuſtom of Merchants to exclude it; and then that ought to be pleaded. *Q.* Whether ſuch Cuſtom. See alſo *Idem* 365.

To make an Indorſer liable to an Action, the Indorſee muſt in convenient Time demand the Money of the Perſon upon whom the Bill was drawn. *Ibid.* 443, 444.

If a Bill be returned proteſted for want of payment, the Drawer is to repay the Money and damage, or elſe he may procure a Security, which is no more but another Perſon of value ſubſcribes the Bill, in theſe or the like words, *I here underwritten do bind myſelf as Principal, according to the Cuſtom of Merchants, for the ſum mentioned in the Bill of Exchange whereupon this Proteſt is made, Dated*, &c.

Now the Drawer, by virtue of this ſupplemental Agreement, hath as much time again to pay Monies as there was given him in the Bill when it was firſt drawn; ſo that if the Money be not paid, together with the Rechange and Charges of the Party, the Party may recover the ſame on the Principal or Security.

XXV. Beyond the Seas the Proteſt * under the Notary's hand is ſufficient to ſhew in Court, without producing the very Bill itſelf. But if a Bill in *England* be accepted, and a ſpecial Action grounded on the Cuſtom be brought againſt the Acceptor, at the Trial the Party Plaintiff muſt produce the Bill accepted, and not the Proteſt; otherwiſe he will fail in his Action at that time.

* That is for not payment, the Bill being once accepted.

Therefore it is ſafe that a Bill once accepted be kept, and only a Proteſt for non-payment be remitted; but a Bill proteſted for non-acceptance muſt be remitted.

XXVI. If a Bill is left with a Merchant to accept, and he loſes the Bill, (or at leaſt it is ſo miſlaid, that it cannot be found) the Party ſhall requeſt the Merchant to give him a Note for the payment according to the time limited in the Bill of Exchange; otherwiſe there muſt be two Proteſts, one for not acceptance, the other for non-payment: But if a Note is given for payment, and there happens to be a failure, yet in that caſe there muſt be a Proteſt for non-payment.

Salk. 128. XXVII. A Bill is remitted to *J. S.* who owes Monies to *J. D.* *J. S.* delivers the Bill to *J. D.* and on the back-ſide ſubſcribes his Name; if *J. D.* receives the Monies, he may fill up the blank as if the Monies had been actually paid to *J. S.* This is practiſed amongſt Merchants, and by them reputed firm and good. But certainly the *Common-Law* looks upon this filling up of blanks after a Man hath once ſigned or ſealed, to be no better than a harmleſs forgery; but if there be either a general or ſpecial Authority to the purpoſe, it may then alter the Law.

By the Opinion of my Lord *Hale*, *Hill.* 28. *Car.* *B. R.* at *Guildhall.*

Note, No Perſon, be it Wife or Servant, can accept of a Bill of Exchange to bind the Maſter without a lawful Authority, as a Letter of Attorney, and the like, which muſt be under hand, unleſs that it has been formerly and uſually done by the Wife or Servant in ſuch caſe, when the Maſter hath been out of Town, who hath approved of the ſame and anſwered payment: It muſt be uſually done; but one Partner may for another.

Styles 370.

A Servant of Sir *Robert Clayton*, and Mr Alderman *Morris*, (but at that time actually gone from them) took up 200 Guineas of Mr *Monck* a Goldſmith, without any Authority of his Maſters; (but *Monck* did not know that he was gone) the Monies not being paid, *Monck* brought an Action againſt Sir *Robert Clayton* and *Morris*, and at *Guildhall* it was ruled *per Keeling* Chief Juſtice, That they ſhould anſwer; and there was a Verdict for the Plaintiff. And though there were great endeavours to obtain a new Trial, yet it was denied, the Court at *Weſtminſter* being fully ſatisfied that they ought

Monck verſus Clayton and *Morris*, *Mich.* 22 *Car.* 2. in *B. R.*

to

to anſwer: For this Servant had uſed often to receive and pay Monies for them; and thereupon they actually paid the Monies.

By *Holt* C. J. A Servant is ſent to receive Money for a Bill, he can't accept of a Note inſtead of Money, without the particular Direction of his Maſter. L. *Raym*. 930.

A Note given in Payment, is intended to be taken under this Condition, that it be paid in convenient Time. *Ibidem*. S. P. Q. if S. C. Eq; Abr. 375, 376.

Note, That which will oblige the Maſter, will be the Authority and Liberty which he uſually gives the Servant; therefore ſuch a Power devolved, ought to be ſecured by the prudenteſt way that may be: Which is generally done by Bonds and Obligations.

And though the ſame ſeems an Act of wiſdom for Merchants and others ſo to take, yet it oftentimes proves the Deſtruction of many a Family. The Father puts out the Son perhaps with no leſs than 2 or 300 *l.* and is himſelf become bound for his Truth and juſt Accounting, &c. The Servant is immediately truſted with his Caſh, and then he, too young to be experienced in the World, either neglects keeping a juſt Account, or keeping that, ſubjects his Maſter's Caſh to be ſpent by himſelf and thoſe who make it their ſole Trade to betray ſuch Youths. The Maſter finding the Conſumption, calls his Servant to account, who, conſcious of the Act, forſakes his Service, dares not ſee his Relations, and then, as a general Conſequence, falls into Company, the which nothing but Providence can preſerve from taking their wicked Courſes. The Father is called to anſwer whatever the Servant hath ſpent or imbezzled; he muſt with a heart full of grief ſubmit to pay, beſides the loſs of the Monies advanced upon the Servant's firſt putting forth: Which ſometimes proves a great Affliction in a Family. On the other Side, if Servants were not to be intruſted, the Myſtery could not be learnt, nor the Buſineſs diſpatched; and therefore faith muſt be given: But then it were Juſtice and Honeſty that as a Father puts perhaps the Child of his love to one in whom he repoſes a Faith and Truſt, that the Maſter ſhould be then as a Parent, ſo they ſhould prevent all Occaſions that might ſubject them to temptations, and not be over haſty in truſting them with the Caſh. Which is the very Bait our *London* Gameſters catch ſuch Gudgeons with.

If a Bill of Exchange by contrary Wind or other occaſions be ſo long on the way, that the Uſance or time limited by the Bill be expired, and being tendred, both acceptance and payment are denied; Proteſts for both muſt be made, and the Drawer muſt anſwer the value, rechange and damage. *Raſtal. fol.* 339.

XXVIII. A Bill once accepted, cannot be revoked by the Party that accepted it, though immediately after and before the Bill becomes due, he hath advice the Drawer is broke. *Bald. in rubr. de conſtit. pecunia in ult. Col. & leg. quidem ff. eadem Col. penult.*

If

If a Bill is not accepted to be paid at the exact time, it muſt be proteſted; but if accepted for a longer time, the Party to whom the Bill is made payable, muſt proteſt the ſame for want of acceptance according to the tenor; yet he may take the acceptance offered notwithſtanding. Nor can the Party if he once ſubſcribes the Bill for a longer time, revoke the ſame, or blot out his Name, although it is not according to the tenor of the Bill; for by his acceptance he hath made himſelf debtor, and owns the draught made by his Friend upon him, whoſe Right another Man cannot give away, and therefore cannot refuſe or diſcharge the acceptance.

Note, This Caſe will admit of two Proteſts, perhaps three.

Bald. in leg. pro debit. C. de bon. actor. Jud. poſſiden. & per Bartol. in leg. ſingul. Col. 7. ff. probatur.

1. One Proteſt muſt be made for not accepting according to the time.
2. For that the Money, being demanded according to the time mentioned in the Bill, was not paid.
3. If the Money is not paid according to that time that the Acceptor ſubſcribed or accepted.

A Bill was drawn payable the firſt of *January*, the Perſon upon whom the Bill was drawn accepts the Bill to be paid the firſt of *March*, the Servant brings back the Bill: The Maſter perceiving this enlarged acceptances, ſtrikes out the firſt of *March*, and puts in the firſt of *January*, and then ſends the Bill to be paid, the Acceptor then refuſes: Whereupon the Perſon to whom the Monies were to be paid, ſtrikes out the firſt of *January*, and puts in the firſt of *March* again: In an Action brought on this Bill, the Queſtion was, Whether theſe Alterations did not deſtroy the Bill? And ruled it did not.

Per L. C. J. *Pemberton, inter Price & Shute, Paſch.* 33 *Car.* 2. *in B. R.*

XXIX. *A.* draws a Bill on *B.* and *B.* is in the Country; *C.* a Friend of his hearing of the Bill accepts it: The Party to whom the Money is to be paid, muſt make a Proteſt for non-acceptance by *B.* and then he may take the acceptance of *C.* and it ſhall bind *C.* to anſwer the Money.

Pinchard v. Fowke, Styles, fol. 416.

If a Bill is drawn on *B.* and *B.* happens to be in the Country, and a Friend of his deſires the Party not to proteſt,

proteſt, and he will pay the ſame, it is good, and ſhall bind ſuch Party.

If there be two joint Merchants or Partners, and one of them accepts a Bill of Exchange, the ſame ſhall bind the other; and an Action of the Caſe on the Cuſtom may be maintained againſt him. *Salk.* 126.

XXX. Merchants generally allow three days after a Bill becomes due for the payment; and for non-payment within three days proteſt is made, but is not ſent away till the next Poſt after the time of payment is expired. *London.*

If *Saturday* is the third day, no Proteſt is made till *Monday*. *Holland.*

XXXI. The Uſe of the Proteſt is this, That it ſignifies to the Drawer that the Party upon whom he drew his Bill was unwilling, not to be found, or inſolvent, and to let him have a timely Notice of the ſame, and to enable the Party to recover againſt the Drawer; for if one draws a Bill from *France* upon a Perſon in *England*, who accepts and fails, or becomes inſolvent at the time of payment, if there be not a Proteſt and * timely Notice ſent to the Drawer there, it will be difficult to recover the Money.

There are two Proteſts: 1. For non-acceptance, which is called Intimation. 2. For non-payment.

* Which is looked upon to be the third Day.

In *Holland* they are not altogether ſo ſtrict, yet there muſt be a reaſonable time of notice; the reaſon is, for perhaps if he had reaſonable and timely notice, the Drawer then might have had effects, or other means of his upon whom he drew, to reimburſe himſelf the Bill, which ſince for want of timely notice he hath remitted or loſt. And the general Rule is, That though the Drawer is bound to the Deliverer till the Bill is ſatisfied, yet it is with this Proviſo, that Proteſt be made in due time, and a lawful and an ingenious diligence uſed for the obtaining payment of the Monies; for it were unreaſonable the Drawer ſhould ſuffer through his neglect.

There is no Danger, be the Party never ſo reſponſible, to proteſt immediately if the Money be not paid when it is due, *i. e.* the third Day, but there may (eſpecially beyond Seas) be great Hazard for want of proteſting.

XXXII. Where a Merchant hath accepted, and before the ſame became due, he becomes inſolvent, or at leaſt his Credit publickly blaſted, a Proteſt ought to go; but

In leg. pro debito in fine C. de bon. author. Judi. poſſiden.

but then there is uſually a demand made, which once coming, the Drawer is compellable to give better Security; and if a ſecond Bill comes, if no Proteſt, then Drawer and Security lie at ſtake.

If a Bill of Exchange be paid before it is due unto one that breaketh afterwards, he ſhall be compelled to pay it again unto the Deliverer of the Money, within what time it is payable.

Brunettie's Caſe.

XXXIII. If a Merchant draws a Bill, and there is a Proteſt for non-payment; if another Perſon hearing of the ſame, declare, that he for the honour of the Drawer will pay the contents, and thereupon ſubſcribes, he is obliged thereby; and in this caſe it has been practiſed, that that Party that received the Money hath put his Name on the back-ſide of the Bill in blank; but the Receipt is ſometimes taken on the Proteſt, which together with the whole proceeding is turned into an Act, and the ſame being drawn by the Notary, is remitted to the Drawer by him who gave honour to the Bill.

Fourteen Days allowed from the Death before Adminiſtration can be committed, unleſs there be a Will.

XXXIV. If a Bill be accepted, and the Party dies, yet there muſt be a demand made of his Executors or Adminiſtrators; and in default or delay of payment, a Proteſt muſt be made: And although it may fall out, that the Monies may become due before there can be Adminiſtrators, or the Probate of the Will be granted; yet that is delay ſufficient for a Proteſt in caſe of non-payment.

But an Intimation ought to go, and that the Acceptor is willing to pay according to Order.

But on the other hand, if the Party be dead to whom the Monies are made payable, and the Monies are ready to be paid, and there is no Perſon that can legally give a Diſcharge, yet a Proteſt ought not to go for not payment: The reaſon is, becauſe there is no perſon that hath any Authority either in Deed or in Law to make it, and a Notary ought not to make it; if he does, and the Party hath received any prejudice thereby, an Action of the Caſe perhaps may lie againſt him for his pains: Nor does it avail, that if Security be offered to ſave him harmleſs againſt the Executors or Adminiſtrators, for that is an Act left to his own Diſcretion; for perhaps the Security may not be liked: But

But whether good or bad, makes nothing as to oblige him in Law.

But if a Man is bound in a Bond to pay a Sum of Money to *J. S.* his Executors, Adminiſtrators, *&c.* and the Obligee dies inteſtate the Day before the Sum becomes due, yet the Bond is not forfeited if not paid at the Day, becauſe there was no body to whom the Obligor could pay to ſave his Obligation: But as *Littleton* ſays, *If it be to pay to* J. S. *generally, you muſt hunt him out all over the Kingdom, if you'll ſave the Penalty.*

XXXV. A Man not found, or being found, not met withal either at Home or the *Exchange*, is cauſe ſufficient for a Proteſt; but in that there muſt be diligence uſed in the finding him.

A Bill returned proteſted for non-payment being once ſatisfied by the Drawer to the Deliverer, the Drawer is diſcharged, and ſo is the Acceptor to him to whom the Monies were to be paid: But the Acceptor, by virtue of his acceptance, makes him Debtor *according to the Cuſtom of Merchants* to the Drawer.

XXXVI. Monies may be had on Exchange by way of Letters of Credit, the which are in two reſpects; the firſt general; the other ſpecial.

The general Letter is open, directed, *To all Merchants and others that ſhall furniſh my Servant or Factor, or any other with ſuch and ſuch Monies*; for repayment of which he binds himſelf to anſwer and pay all ſuch Bills of Exchange as ſhall be drawn on him upon the receipt of the value, by his Servant, Factor, or other Perſon: If there be really Monies advanced on this Letter of Credit, and paid to the Factor, Servant, or other, and Bills of Exchange are ſent to the Party that ſent ſuch Letter of Credit, and if he refuſes to accept, yet according to the Cuſtom of Merchants he is bound to pay: The Reaſon is, for that there was no Reſpect had to the Ability of the taker up, but to him that gave his Letters of Credit: And therefore in ſuch Caſe if an Action at Law be brought, the particular Cuſtom as to that Point muſt be carefully ſet forth.

The ſpecial Letters of Credit, where one writes a Letter to furniſh another Man's Factor or Agent; there is in this the ſame Remedy as above.

As Bills of Exchange ſeldom come without Letters of Advice, ſo ought they to be purſued: If a Bill ſhall expreſs, *And put it to the Account of* A; and the Letter of Advice ſays *B*; this muſt be proteſted againſt, for it cannot ſafely be paid, at leaſt running the Riſque of an equitable Suit.

XXXVII. If one pays Money on a Bill before it be due, and the Party breaks, it has been conceived that the Party ought to anſwer the Drawer: The Reaſon hath been, becauſe the Drawer might have countermanded the ſame, or ordered the Bill to be made payable to another.

In *Italy* if Money is paid to a Banker's Servant, and if the Maſter ſubſcribe, *Pagate com ſi dice*, this binds the Maſter as effectually as if he had ſubſcribed it with his own hands.

XXXVIII. A Bill drawn by a Merchant in *London* payable by another Perſon beyond Seas, ſuch Bills in moſt Countries are aſſignable over from Merchant to Merchant, and the laſt Perſon may ſue and recover the ſame upon an acceptance: But in *England*, only the firſt Perſon mentioned in the Bill, and to whom the Money is made payable may recover. 'Tis true, ſuch Perſon to whom the Money is made payable may for valuable Conſideration deliver this Bill to another Perſon, and he may indorſe an Order on the back-ſide; and if the Party afterwards refuſes Payment of the ſame, it may be ſued in the Party's Name to whom the ſame was transferred, laying the ſame by way of Cuſtom.

But if the Perſon to whom payable, indorſes it for Payment of Part to *J. S.* the Drawer is not liable to the Action of *J. S.* for, a Man cannot make another liable to two Actions, where by the Contract he is liable but to one. L. *Raymond* 360, 744.

Where the Bearer receives Value for a Bill not indorſed, it is a Sale of the Bill. *Idem* 442. But if there be an Indorſement, though only upon Diſcount, the Indorſer

Indorſer is liable. *Idem* 443, 444. And a blank Indorſement may be filled up by the Indorſee. *Ibid.* In Action againſt Indorſer, not neceſſary to prove the Hand of the Drawer. *Ibid.*

It is eſſential to a Bill of Exchange to be negotiable. *Lucas* 294.

It is enacted by 3, 4 *A.* *c.* 9. That all Notes payable to any Perſon or Order ſhall be aſſignable over in the ſame Manner as Inland Bills of Exchange are or may be, and that any Perſon to whom ſuch Note is indorſed, may maintain an Action for the Money, either againſt the Perſon who ſigned ſuch Note, or againſt any of the Perſons who indorſed the ſame, in like manner as in Caſes of Inland Bills of Exchange.

By *Stat.* 2. *Geo.* 2. *Ch.* 25. *Sect.* 1. If any Perſon ſhall forge, or procure to be forged, or aſſiſt in forging any (*inter alia*) Bill of Exchange, Promiſſory Note for Payment of Money, Indorſement, or Aſſignment of any Bill of Exchange, or Promiſſory Note for Payment of Money, or any Acquittance or Receipt for Money or Goods; or ſhall utter or publiſh as true any ſuch forged, *&c.* knowing the ſame to be forged, with an Intent to defraud any Perſon; every ſuch Offender ſhall be guilty of Felony without Benefit of Clergy. And,

By *Stat.* 7. *Geo.* 2. *Ch.* 22. If any Perſon ſhall falſly make, alter, or forge, or procure to be falſly made, *&c.* or aſſiſt in falſly making, *&c.* any Acceptance of any Bill of Exchange, or the Number or principal Sum of any accountable Receipt for any Note, Bill, *&c.* or any Warrant or Order for Payment of Money or Delivery of Goods, or ſhall utter or publiſh any ſuch falſe Acceptance, Bill, *&c.* with Intent to defraud any Perſon; every ſuch Offender ſhall ſuffer as a Felon without Benefit of Clergy.

XXXIX. In an Action on the Caſe grounded upon the Cuſtom of Merchants, that whenever any ſuch or other Perſon, negotiating for them with any other Merchant in *England*, have Bills directed to them, that if He to whom ſuch Bills are directed, refuſe to accept on ſight, or to pay ſuch Bills, then he that drew it ought: Both being by the Cuſtom to be Merchants, the Bearer 1 *Keb.* 592, 636.

as

as well as the Drawer. And the Plaintiff not having ſhewed that the Bearer was ſuch a Merchant or Perſon negotiating, it was moved to ſtay Judgment for that Cauſe; but Judgment was given for the Plaintiff, for by the Court ſuch Merchant, is referred only to him, to whom the Bill is directed, and to the Procurers of ſuch a Bill, and not to the Drawers, or they to whoſe uſe the Money is to be paid.

See where an Averment is neceſſary of the Defendant's being a Merchant on ſuch Action upon the Cuſtom of Merchants, *Cro. James* 306. *Oaſte verſ. Taylor*. and *Cro. Charles* 301. *Barnaby verſ. Rigalt*.

Salk. 125. In an Action on the Caſe on an Inland Bill of Exchange brought by the Indorſer againſt the Drawer it was objected, that there was no Averment of the Defendant's being a Merchant; but it was anſwered and reſolved by the Court, that the Drawing of the Bill was a ſufficient merchandizing and negotiating to this Purpoſe.

CHAP. XI.

CHAP. XI.

Of Monies advanced by way of Bottomry, or Fœnus Nauticum.

I. *How* Commerce *is made equivalent to natural Community.*
II. *Whether Money be fit only to maintain the Trade and Credit of Vice.*
III. Abraham *choſe to acquire a Property by Money.*
IV. *Of the natural and inſtrumental Meaſure of the Value of Things.*
V. *How Money is equal to all Things.*
VI. *Money is for buying, and hinders not, but helps Permutation.*
VII. Money *the Inſtrument of Charity and Sacrifices, as well as our Neceſſities.*
VIII. *Of the Difference between Monies advanced to be uſed in Commerce at Land, and that which is advanced at Sea.*
IX. *Of Monies advanced by way of* Bottomry, *when the Contract hath its Inception.*
X. *Of Monies ſent on Ship-board, and the Veſſel is wreck'd, where the Lender ſhall bear Share of the Loſs, and where not.*
XI. *Of Monies taken up by the Maſter, where the ſame ſhall oblige the Owners, and where not.*
XII. *The Derivation and Inſtitution of this ſort of Loan, and for what Cauſes.*
XIII. *Of the ſeveral Ways of taking up of Monies by way of* Bottomry, *real and feigned.*
XIV. *Monies ſo advanced, whether Gain ought to be bounded, or otherwiſe left to the Will of the Lender.*
XV. *Of* Uſura Marina, *how reaſonable the ſame ſtands at this Day.*
XVI. *Of Monies advanced to a conſiderable Profit called* Uſufruit.

I. MONEY is one of thoſe things, which they who want, want all other things but Words to reproach their bad Fortune. But ſometimes it is the Policy, even of Rags and Poverty itſelf, to undervalue that which it cannot have, and to convert that which it hath (though never ſo mean) into an Eſteem; and then to lodge as much Pride in a Tub, as *Alexander* could in a Palace, though it could not tempt him to a Change of Condition.

Nil habet infælix paupertas durius in ſe,
Quàm quod ridiculos homines facit——

No wonder therefore, ſeeing rich Men will be obſtinate to hold their Advantages, that deformed Poverty, (which mixes with them in the ſame Frame, as a Shadow to ſet off

their Colours the better) would have the Rich to deſcend to them; and that inſtead of ſetting out Monies by way of *Bottomry*, *Uſury*, and the like, they would not have any ſuch thing as Money at all, but would have all things reduced into a State as is before mentioned *.

* *Lib.* 1. *cap.* 1. §. 1, 2, 3.

It cannot be denied, but that we all live by the natural or intrinſick Value of Things; but the way to come by them is an Inſtrument of Civil Value, which is Money; inſtead of Community, therefore, we now have Commerce: Which *Commercium* is nothing elſe but *Communio mercium*; but Communion muſt needs be by the means of another thing that may bear equal Proportion on both ſides, which is Money only. But now let us hear, and, if poſſible, ſatisfy the Complaints that are made againſt it ſo impatiently.

Where there is great Luxury, there muſt be likewiſe great Induſtry to maintain it; and therefore the Induſtry of this Civil State muſt be greater than that which is in the ſimple State of Nature: But what is there here to blame, ſeeing Induſtry, no more than Plenty, is, in itſelf, a Sin?

Aſcham de Nat. Monet. cap. 6.

II. It is the Anſwer of Envy or Ignorance, *Prima peregrinos obſcœna pecunia mores Intulit.* Money is that (ſay they) which maintains the Trade and Credit of Vice, if that were taken away, we ſhould look after nothing but Neceſſaries which are virtuous; it makes too nice Inequalities and Diſtances, and is not ſignificant enough in the beſt Things: For all the Money in the World is not really worth one Penny-Loaf, which is convertible into our Natures and Subſtances; it ſerves only to aſſure Fortune, but not Virtue; it is accepted as the Meaſure of all things Natural, Moral, and Divine: For Honour is nothing but ancient Riches †, and in Morals, *Virtus poſt nummos*; this, in Religion, breeds that Root of all Evil, Covetouſneſs: For, in a ſimple State of Nature, neceſſary things muſt needs be ſpent within a ſhort Time, and the Return of the Sun brings a new Supply and a Treaſure greater than the *Indies*; of which One ‖ makes this Obſervation, *That it was got in Blood, ſails home in a Sea of Blood, and never reſts till it be laid out in Blood.* This was that which was made the Price of *Salvation*, even of the Blood of our *Bleſſed Saviour*, thirty Pieces for that which was worth thirty

† *Ariſt. Polit.*

‖ *Campanella Monarch. Hiſp.*

thirty thouſand Worlds; but in the Religion of the firſt Times, *Nullo violatus Jupiter auro*, as *Juvenal* hath it.

And if this had not been brought into the World, we ſhould not have ſo much to diſcount for at the Day of Judgment. Why therefore ſhould that which is condemned to the Obſcurity of the Earth, and lodged ſo near Hell, now be made the Price of all that which is above the Earth, even *à Solo uſque ad Cælum?* Or why ſhould we be excluded from the Gifts of Nature, unleſs we have thoſe of Fortune? Is it not then more reaſonable that rich Men loſe this Inſtrument of Luxury, than the Poor ſhould loſe the neceſſary Means of their Subſiſtence? This is the Plea which is made *in forma Pauperis, & de ipſa Paupertate.*

Moſt certain it is, that neither the ſtupid Simplicity of the Woods, nor Poverty itſelf, are any Part of Virtue; and therefore are not reckoned Bleſſings, as Riches were to *Solomon*, (he who built God's firſt Temple, and put his Religion in luſtre) and as they likewiſe were to *Numa*, from whom Money was called *Nummus*; he likewiſe built the firſt Temple at *Rome*, and kindled firſt the Veſtal Fire, *& ferocem populum deorum metu mitigavit.*

III. We know how God converſed with *Abraham*, who was the firſt that had Money, and made uſe of it to buy a Property: It is true, they with whom he inhabited called him a Prince; but that was no Argument to him to diſown their Properties, but for the contrary, leſt they ſhould think that Dominion or a Right to Things was founded in Grace.

IV. But to come more cloſe to the Queſtion, and to examine the Reaſon and Neceſſity of this Meaſure; Money is like a Law or Government, which are all conſtituted by the ſame extreme Neceſſity; therefore the counterfeiting or attempting to deſtroy any of theſe by private means, is every where Treaſon. Now this Meaſure is two-fold, either Natural or Civil, or rather Natural, and the Inſtrument which expreſſes the natural by equal Permutation: The natural Meaſure is proportioned either by *Want*, or *Plenty*. In *Want* we conſider whether the thing be uſeful or neceſſary; things which are neceſſary are beſt, but of leaſt Price; as a Loaf of Bread is more neceſſary, but infinitely cheaper than a Diamond. One Man hath Clothes, another Leather; thoſe two poſſibly have no need of one

another, and therefore there will be no Permutation betwixt them; but if one had need of another, then he who were more preſs'd, would come to the Price of the other: And therefore *Want* or *Plenty* is the Meaſure of eſtimating things, and is the Bond of Society, whereby one Man ſhews he is or may be uſeful to another; and Nature hath ſo ordered it, that no Man is ſo rich who hath not ſome need of the Poor; and no Man is ſo mean and abject, but he may be ſome ways uſeful to the Rich.

Money is like the Middle Term of a Syllogiſm, of which it is ſaid, *Quæ conveniunt in tertio conveniunt inter ſe.*

V. The Civil Meaſure, or rather Inſtrument, whereby the Natural expreſſes itſelf, is *Money*, which hath but a feigned Value, and therefore it is ſometimes higher and lower in eſteem as Men pleaſe; which could not be, if its Value were natural, which is unalterable. If I have Cloth at ſuch a Price, and you have Wines at the ſame Price, then we regarding the ſame Price, may make an equal Permutation: Or if I give to you ſo many Pieces of Gold for your Cloth at the ſame Price, the Sale is equal again. Whether it be an Inconvenience, that in ſome Countries * it is ſometimes at a higher Value than at another, is not a Conſideration of this Diſcourſe; for the Price of things themſelves change more than any Money doth daily.

* *Poland*, and generally in moſt of thoſe Northern Countries.

VI. *Money* is an Invention only for the more expedite Permutation of things; but it doth not follow, that Men may not make any Permutations but by Money, even as well now as if we were in our natural State. If they who dig now in waſte Hills have their Harveſt of Beans well gathered in, but had need of Wine for the Stomach's ſake, or of Drugs for Health's ſake; if the Vintner, or Apothecary have no need of Beans, what uſe will they make of the natural Value of their Beans without Money? Or if need be, what would they do till their Beans are gathered? Money therefore hinders not Permutation and Commerce of natural things, but aſſiſts them; nay, it is therefore an Inſtrument of Inſtruments; for he who hath Money may buy things which he need not uſe, but ſell, thereby to get other things afterwards for his Uſe. There is no Nation or People ſo barbarous, but have Money or a publick Inſtrument of Permutation either in Metals or in Fiſh Bones, &c. for it imports not much of what matter it is, provided it be durable, not counterfeitable, and difficult to come by.

VII.

VII. Take away this fungible Inſtrument from the Service of our Neceſſities, and how ſhall we exerciſe our Charity, which is a Branch of Religion and Juſtice, as well as of Humanity? He who goes to Church, paſſeth, as it were, through two Temples, the Poor at the Porch, and the Temple itſelf: And the giving at the Porch is called *Sacrifice*, *Offering*, and *Gift*, as well as that at the Altar. God would be ſacrificed to only in one Town of the World, *Jeruſalem*: But could that have been, if *Money* and *Money-Changers* had not been allowed? How could they, who came from ſuch remote Places, have, by any other means, brought their Oxen, Calves, Goats and Doves to the Altar? If there were nothing further to ſhew, but that one Piece which our Saviour himſelf coined miraculouſly in the Mouth of a Fiſh, it were Argument ſufficient that the Uſe of *Money* may be both good, juſt, and neceſſary.

Vide Chap. of Exchange, §. 1.

VIII. Things being thus ſtated, and that *Money* is both good, juſt, and neceſſary, it will be demanded loudly, That admitting a reaſonable Advantage may be made by way of Uſury, *quo jure* is it, that an Advantage upon the ſame, more than what the Law allows, is taken?

The Diſtinction is great between Monies lent to be uſed in Commerce at Land, and that which is advanced to Sea. In the firſt, the Laws of the Realm have ſet Marks to govern the ſame, whereby the avaricious Mind is limited to a reaſonable Profit: The Reaſon of that is, becauſe the Lender runs none, but the Borrower all the Hazard, whatever that *Money* brings forth. But *Money* lent to Sea, or that which is called *Pecunia* * *trajectitia*, there the ſame is advanced on the Hazard of the Lender, to carry (as is ſuppoſed) over Sea; ſo that if the Ship periſhes, or a Spoliation of all happens, the Lender ſhares in the Loſs, without any Hopes of ever receiving his *Monies*; and therefore is called ſometimes *Uſura Marina*, as well as *Fœnus Nauticum*, the Advantage accruing to the Owners from their Money, ariſing not from the Loan, but from the Hazard which the Lender runs; the which is commonly reduced to a time certain, or one or more Voyages, according to their ſeveral and reſpective Agreements.

Leg. 3. *D. de Naut. fœn. lib.* 1. *eod. l.* 62. *D. de rei. Vindic.* *Locinius, lib.* 2. *cap.* 4. §. 2.

* *Leg. Fœn. Naut. Leg. periculi eod. Lex Mercat.* 122.

IX. If the Bonds be ſealed, and the *Money* is advanced, if the Ship happens to miſcarry by Storm, Fire, Enemy, or any otherwiſe before the Voyage began, then the Borrower runs the riſque, unleſs it be otherwiſe provided generally, as that if ſuch a Ship ſhall not arrive at ſuch a Place at ſuch a time, &c. there the Contract hath its Inception from the Sealing; but if the Condition be, That if ſuch a Ship ſhall ſail from *London* to *Amſterdam*, and ſhall not arrive there, &c. then, &c. there the Contingency begins not till the Departure. Yet it has been conceived, that if the Maſter takes up Money accordingly, and buys in a lawful Lading, but will endeavour to defraud the Prince or State of their Cuſtoms, and put ſuch Goods on Board, by means whereof he has incurred a Forfeiture of his Ship; in ſuch Caſe the Lender is not obliged to ſuch hazard.

Vide paſſim ad leg. de Fœn. Naut. & DD. leg. Naval. Rhod.

Vide leg. 3. C. de Fœn. Naut.

X. If *Money* be lent on Ship-board by a Merehant *ſuper Cargo* or Paſſenger, and before the Day of Payment the Ship happens to be wreckt or caſt away; if there be ſuch a Saver as will admit a Contribution, then the Party is not to have his whole *Money*, but is to come into the Average: But if the Time of Payment were paſt before the Misfortune happened, then the Lender muſt be repaid his whole Money free from Contribution.

Leg. Naval. Artic. 17.

And therefore by the Laws Marine, if the Borrower detains any ſuch lent Monies beyond the Term appointed for the repaying, he ſhall at his Return not only pay the Profit agreed on before the Voyage, but alſo augment the ſame according to the Time that hath accrued ſince the Day of Payment.

Artic. 18.

Where the Bond will be forfeited by Deviation. *See* 2 *Cha. Ca.* 130. 2 *Salk.* 444.

Where the Ship never went out of the River, the Lender was obliged to take his Principal and Intereſt, becauſe he ran no Hazard, 1 *Vern.* 263.

Courts of Equity will not aſſiſt Bottomry-Bonds, which carry an unreaſonable Intereſt. *Dandy* and *Turner*, Equ. *Abr.* 372.

XI. A Maſter of a Ship hath no Power to take up *Money* by *Bottomry*, in Places where his Owner or Owners dwell, unleſs it were for ſo much only as his Part comes to

in

in the ſaid Ship: Otherwiſe he * and his Eſtate muſt ſtand liable to anſwer the ſame. (*a*) But when a Maſter is out of the Country, and where he hath no Owners, nor any Goods of theirs, nor of his own, and cannot find means to take up by Exchange or otherwiſe, and that for want of *Money* the Voyage might be retarded or overthrown, *Monies* may be taken up upon *Bottomry*, and all the Owners are liable thereunto; otherwiſe he ſhall bear the Loſs, that is, the Owners are liable by their Veſſel, though the *Money* is not ſo imployed in truth; and the Owners have their Remedy againſt him whom they put in Truſt. (*b*) But the Perſons of the Owners are no ways made liable by the Act of the Maſter for *Monies* taken up.

If Owners agree not in ſetting out the Ship, moſt Voices ſhall carry it, and then *Money* may be taken up for their Part by *Bottomry*, or *Fænus Nauticum*, or by *Hypothecating* ſuch a Proportion of the Ship.

Many Maſters of Ships having Enſured or taken up *Monies* upon *Bottomry* to greater Sums of Money than the Value of their Adventure, do wilfully caſt away, burn, or otherwiſe deſtroy the Ships under their Charge, the ſame was made Felony, and the Perſon and Perſons ſo wilfully doing or procuring the ſame to be done, were to ſuffer Death.

XII. The Signification of this *Fænus Nauticum*, is by the *Dutch* called, *Bomerie*, *Bodmerie*, *Boddemerii*, (ſo variouſly pronounced) from the Keel * or Bottom of the Ship upon the Parallel whereof the Rudder of a Ship doth govern and direct the ſame; *parte pro toto ſumpta, ita primum appellata, cum etiam lingua Gallorum antiqua & Britannica Bodo vel Bodun fundum aut profundum ſignet* † *in quem navis fundum, vel ipſam navem ejuſq; uſum mutuo accepta eſt pecunia, ſed poſtea latius pro fænore nautico etiam uſurpari cæpit.* And the Money ſo taken up by the Maſter is done upon great Extremity, and that for the compleating of the Voyage when they are in Diſtreſs and Want in ſome Foreign Parts; and indeed ſuch taking up is indeed in the Nature of Mortgaging the Ship, for *le Neif eſt oblige al payment de ceo, &c.* And in the Inſtrument there is a Clauſe that expreſſes that the Ship is engaged for the Performance of the ſame.

* *Teſtatur Vinius in Peckium ad L. L. Nautic. quem vide pag.* 95. *Leg. Oleron. c.* 1 *Leg.* 4. *D. de Naut. fæn. l.* 1. *c. eod. Leg. qui Romæ* §. *Calimachus de verb. obl. & ibi* Gothſr. & *alios.*

(*a*) *Hob.* 12. *Mo.* 918. *Noy* 95. *Latch.* 252. *Salk.* 34. *Lex. Merc.* 102, 122.

(*b*) *Salk.* 35. 2 *Mod. Caſes* 79.

16 *Car.* 2. *cap.* 6. §. 12. 11 *G.* 1. *c.* 29. § 6.

* *Joh. Locin. lib.* 2. *c.* 4. §. 1. *Latche's* Rep. *fol.* 252. *Scarborough's* Caſe.

† *Teſte Cambdeno in Britannia, p. m.* 149. *Locinius, lib.* 2. *cap.* 4. §. 1.

Monies that are advanced are upon two Securities, the one is on the bare Ship, the other upon the Perſon of the Borrower, ſometimes upon both: The firſt is where a Man takes up Monies and obliges himſelf, that if ſuch a Ship ſhall arrive at ſuch a Port, then to repay (perhaps) double the Sum lent; but if the Ship happens to miſcarry, then nothing.

Difference between this and other Loans at Intereſt.

This Money is likewiſe called *pecunia trajectitia*, becauſe that upon the Lender's Danger or Adventure, it is carried beyond or over the Seas, ſo that if the Ship periſh, or all be ſpoiled, the Lender does loſe his whole Money lent: But on the contrary, Money lent at Intereſt is delivered at the Peril of the Borrower, and the Profit of this is merely the Price of the ſimple Loan, and is called *Uſura*. But the Profit of the other is a Reward for the Danger and Adventure of the Sea, which the Lender takes upon him during the Loan, which is to be underſtood until the Voyage be ended.

XIII. So likewiſe ſome will take up Monies, the Condition reciting, *Whereas there is ſuch a Ship*, naming her, *bound to* Amſterdam, *whereof ſuch a Man is Maſter*, (whereas indeed there is no ſuch Ship or Maſter in Nature) *that if that Ship ſhall not arrive at ſuch a Place within twelve Months, the Money agreed on to be paid, ſhall be paid*; *but if the Ship ſhall arrive, then nothing*. The firſt of theſe is honourable and juſt, according to the laudable Practice among Marine Perſons, and though the Advantage runs high, as 20, 30, nay ſometimes 40 *per Cent.* without Conſideration of Time; (for the Monies are to be paid within ſo many Days after the Ship's ſafe Arrival;) yet in regard the Adventure is born by the Lender, for (if the Ship periſhes, the Advancer loſes,) the Laws and Practice of all Maritime Countries allow of the ſame. And therefore by the *Common Law*, if an Action of Debt be brought on ſuch an Inſtrument, the Defendant cannot plead the *Statute* of *Uſury*. And ſo it was adjudged where one *Sharpley* had brought an Action of Debt on a Bond for Monies taken up upon *Bottomry*: The Defendant pleads the *Statute* of *Uſury*, and ſhewed that a certain Ship called the made a Voyage to fiſh in *Newfoundland*, (which Voyage might be

Toto tit. dig. & Cod. de Naut. fœn. & Doctorum ſic Hardus in tit. Cod. de Naut. fœn. n. c.

Trajectitia pecunia propter periculum creditoris quamdiu navigat navis infinitas uſuras capere poteſt; upon which Law it was obſerved by *Anianus, Quia maris periculo committitur in quantas convenerit uſuras hanc pecuniam dare creditor poteſt.*

performed

performed in eight Months) and the Plaintiff delivered 50 *l.* to the Defendant to pay 60 *l.* at the Return of the Ship to *D.* and if the ſaid Ship by Leakage or Tempeſt ſhould not return from *Newfoundland* to *D.* then the Defendant ſhould pay the principal Money; and if the Ship never returned, then nothing to be paid. Upon * Demurrer it was adjudged the ſame was not Uſury: For if the Ship had ſtaid at *Newfoundland* two or three Years, yet at her Return but 60 *l.* was to be paid, and if ſhe never returned, then nothing.

Verum enimvero hic proprie non verſari, damnatum fœnus, ſed compenſationem aliquam periculi, quod creditor contra naturam mutui in ſe recepit partem. Johanes Locinius, lib. 2. cap. 4. §. 1, & 2. * Trin. 6. Jac. in B. R. 2 *Cro.* 208. *Sharpley* verſus *Harroll,* 1 Levinz 54. *Sayer & Cleane, &* 1. *Sid.* 27. Cro. Jac. 508. 1 Keb. 711.

The other Advance which is upon a fictitious Suppoſition of a Ship and Maſter, wherein indeed there is no ſuch Nature, is more unconſcionable, the ſame being the common Practice that's uſed amongſt the *Italians,* and now on this ſide the Water, though the ſame is as to internal Right unjuſt, yet it is daily practiſed, and it was not long ſince adjudged † that ſuch Contract was good, according to the *Common Law* of this Realm, and that on a ſpecial Verdict.

† *C. B. Hill.* 22, 23 *Car.* 2.

XIV. Moſt certain it is, that the greater the Danger is, if there be a real Adventure, the greater may the Profit be of the Monies advanced: And ſo hath the ſame been the Opinion of Civilians, and likewiſe ſome Divines; though ſome ſeem to be of Opinion, that any Profit or Advantage ought not to be made of Monies ſo lent, no more than of thoſe that are advanced on ſimple Loan, and on the Peril of the Borrower. However, all or moſt of the trading Nations of Chriſtendom do at this Day allow of the ſame, as a Matter moſt reaſonable, on account of the Contingency or Hazard that the Lender runs; and therefore ſuch Monies may be advanced ſeveral ways, and a Profit may ariſe ſo, that there runs a Peril on the Lender.

Vide Carolum Molinæum *de uſur. q.* 3. *n.* 92. *ait hoc approbant omnes Theologi ut creditor poſſit aliquid accipere ultra ſortem pro ſuſceptione periculi.* But ſurely that muſt be upon a real Venture.

Cl. Salmaſius, *cap.* 9. *de modo uſur. fol.* 380, 188, 218. *Trajectitia pecunia propter periculum creditoris, quamdiu navigat navis, infinitas uſuras capere poteſt.* Upon which place *Anianus* obſerves, *Quia maris periculo committitur in quantas convenerit uſuras hanc pecuniam dare creditor poteſt. Vide Novel. Conſt.* 106, 110.

XV. There is likewiſe a ſecond way of advancing Monies called *Uſura Marina,* joining the advanced Monies and

and the Danger of the Sea together; and this is obliging ſometimes upon the Borrower's Ship, Goods and Perſon: The Product of which by Agreement will advance ſometime 20, 30, and ſometimes 40 *per Cent.* As for inſtance, A private Gentleman has 1000 *l.* ready Money lying by him, and he has Notice of an ingenious Merchant that has good Credit beyond Seas, and underſtands his Buſineſs fully, applies himſelf to him, and offers him a 1000 *l.* to be laid out in ſuch Commodities as the Merchant ſhall think convenient for that Port or Country the Borrower deſigns for, and that he will bear the Adventure of that Money during all that Voyage; (which he knows may be accompliſhed within a Year) hereupon the Contract is agreed upon, 6 *per Cent.* is accounted for the Intereſt, and 12 *per Cent.* for the Adventure outwards, and 12 *per Cent.* for the Goods homeward; ſo that upon the Return the Lender receives 30 *per Cent.* which amounts to 1300 *l.*

Uſura legitima ejus qui trajectitiam pecuniam trans mare vehendam fœneratur. id eſt, cum periculo ſuo, centeſima eſt.

And this cannot be *Uſury* by the Laws of this Realm, for the Riſque and Danger that the Lender runs.

In the *Eaſt-India*, and ſome other Companies.

XV. There is alſo another way, but that is both honeſt and honourable, called *Uſufruit*, that is, a Stock in a Company or Society, which is perpetual; ſuch a Stock or Portion may be purchaſed, that is, the Advantage or Benefit ariſing by the Improvement of the ſame.

As for inſtance, The *Eaſt-India* Company hath a *Stock* lodged in their Hands by divers Perſons, which they in the moſt prudent manner as they ſee fit, imploy to ſuch Places as they judge moſt proper; if a Return is made, the Advantage of that is diſtributed to each Perſon that is any way intitled to that *Stock*; which Advantage is called a *Dividend*, and perhaps may afford ſome 20 or 30 *per Cent.* But on the other hand, if that Proportion of the Stock which goes out happens to miſcarry, the Abatement is proportionable, and ſo the Stock may be leſſened, unleſs that they will ſtay the *Dividends* to keep up the Stock; the which they may do; *For it is a Truſt repoſed of ſo many Mens Monies in their Hands, to yield them ſuch Advantage as they ſhall upon a juſt Account ſet out:* So that if a Man hath 1000 *l.* Stock, he cannot take the ſame out of the Great Stock whereby to leſſen the ſame, but he may transfer that *Uſufruit* by that cuſtomary Way which they have to any other Perſon, for a valuable Conſideration in *infinitum*.

CHAP.

CHAP. XII.

Of Impoſitions called Great Cuſtoms, Petty Cuſtoms, and Subſidies.

I. Impoſitions, *whether they may be commanded without the Three Eſtates, and of* Magna Charta *touching the ſame.*
II. *Of* Impoſitions *made voluntary by conſent of Merchants, and of the Adnul of the ſame.*
III. *Of the Confirmation of the Great Charter for free Traffick; and of the Settlement now made on His Majeſty of the ſame.*
IV. *Of the Immunities formerly of the* Hanſiatick *Towns here in* England, *and when determined.*
V. *Of the Antiquity of Cuſtomers or Publicans as well in former Ages as at this preſent time, in moſt Nations.*
VI. *Of the Impoſition called* Magna Cuſtuma.
VII. *Of that which is called* Parva Cuſtuma *payable by Strangers, and the Act called commonly* Charta Mercatoria.
VIII. *Of Subſidy, and of what, and the Rates how ſet.*
IX. *Of Subſidy by Strangers on Wines.*
X. *Of Goods not rated how to pay.*
XI. *Of the Subſidy Duty for Cloths.*

I. *IMPOSITIONS* neither in the Time of War or other the greateſt Neceſſity or Occaſion that may be (much leſs in the Time of Peace) neither upon Foreign nor Inland Commodities of what Nature ſoever, be they never ſo ſuperfluous or unneceſſary, neither upon Merchants, Strangers, nor Denizens, may be laid by the King's abſolute Power without Aſſent of Parliament, be it never ſo ſhort a time.

By the Statute of *Magna Charta*, *Chap.* 30. *All Merchants, if they were not openly prohibited before, ſhall have their ſafe and ſure Conducts, to enter and depart, to go and tarry in the Realm, as well by Land as by Water, to buy and ſell without any evil Tolls, by the old and rightful Cuſtoms (except in time of War) and if they be of the Land making War againſt us, and be found in our Realm at the Beginning of the War, they ſhall be attached without Harm of Body or Goods,*

Goods, until it be known to us or our Juſtices how our Merchants be intreated there in the Land making War againſt us. The Statute of which this is a Branch, is the moſt ancient Statute Law we have, won and ſealed with the Blood of our Anceſtors, and ſo reverenced in former times, that it hath been twenty-nine times ſolemnly confirmed in Parliament.

Cuſtoms, Subſidies, Tolls, Exciſes, Impoſts, and other Duties upon Commodities imported or exported are due to the particular Princes or States, by the general Law of Nations, as a Matter inherent to their Prerogatives, as they are the abſolute Commanders, Proprietors, and Maintainers of the Harbours, Havens and Ports, where the Commodities are exported or imported: And all Merchants are bound to take notice thereof, and obſerve the ſame, according to the Feudal Laws, Conſtitutions and Proceedings therein uſed in all Countries reſpectively, whereby they are ſecured and defended in their Trade and Traffick. Or otherwiſe in Breach of not obſerving ſuch Laws and Conſtitutions, they are in danger of Mulcts, Fines, Loſs and Forfeitures of their Goods and Commodities. To give an exact Account of the Nature, Antiquity, ſeveral ſorts of Cuſtoms, Subſidies, Impoſts, and other Duties relating to Merchants, would take up too large a Compaſs for this Treatiſe, therefore ſhall refer as to the Nature of them to the ſeveral Books of my Lord *Coke* in his 2 *Inſtit.* upon the *Stat.* of *Magna Charta, Cap.* 30. And other Statutes and Books which are many on this Subject.

Rot. Almaign. 3 Ed. 3 Rot. Clauſ. 29 Ed. 1. Extract. Bruxelles.

II. *Impoſitions* were in ſome ſort done *Conſenſu Mercatorum*, by *Edward* the Firſt, and *Edward* the Third: And again in *Henry* the Eighth, of which the Houſe of *Burgundy* complained, as againſt the Treaty of Entercourſe.

King *Henry* the Third finding that ſuch a *Modus* of Impoſition tended to the Deſtruction of Trade, and apparent Overthrow of Commerce, and was againſt the Great Charter, made Proclamation *Anno* 16. in all Ports of *England*, that all Merchants might come *faciendo rectas & debitas conſuetudines, nec ſibi timeant de malis tollis*, for that ſuch Impoſitions had no better Name than *Maletolts*.

Dorſ. Clauſ. an 16 Hen. 3. n. 20.

Rot. Clauſ. 11 Ed. 2.

The like was declared and done by *Edward* the Firſt in the twenty-fifth Year of his Reign; and *Edward* the Second, in the eleventh and twelfth Years of his Reign.

And

And though the King cannot lay any Impoſition on Merchant or Merchandize without Aſſent in Parliament, yet the King by his Prerogative may reſtrain them from Trading (if not from any Chriſtian Foreign Prince) yet from any Infidel Realm, State or People, without his Royal Licence: And the Reaſon of this is, for that by ſuch Commerce it might give occaſion for the Relinquiſhment of the Catholick Faith, and an Opportunity to adhere to Infideliſm; and therefore generally in *Edward* the Third's Time, Licenſes were frequently granted with this Preamble, that the King having ſpecial Truſt and Confidence that the Party would not decline from his Faith, did licenſe him, *&c.* In the ſeventh Year of King *James* this very Matter came in Queſtion, upon Licenſe granted to a Merchant to trade to the *Eaſt-Indies*.

Vide Lane's Report in *Bates's* Caſe, this Matter there debated. *Mitchelbourn* and *Mitchelbourn's* Caſe. C. B. 2 *Brownlow* 296.*

III. In 2 *Ed.* III. the Great Charter for free Traffick was confirmed; and about ſome three Years after there were Commiſſions granted for the raiſing of a new kind of Tallage, but the People complained; whereupon the Commiſſions were repealed, and he promiſed never to aſſeſs any but as in the Time of his Anceſtors.

12 *Ed.* 3. *Memb.* 22. *in dorſ. Rot. Almaigne.*

But this Prerogative Power of impoſing inward and outward upon Commodities over and above the ancient Cuſtom of Subſidy without a free Conſent in Parliament, is now ceaſed and ſettled; and that Queſtion, which for many Ages had been handled by the moſt Learned of their Times, in the aſſerting and in the denying, will never more be remembered, the ſame being now eſtabliſhed by Act of Parliament: Which being managed for ſome time, was afterwards farmed out, and now again managed. The like having been done by former Kings, as did *Edward* the Third with the * New and Old Cuſtoms of *London* for 1000 Marks monthly to be paid unto the Wardrobe.

* *Clauſ. Anno.* 5 *Ed.* 3. *Orig.* 17 *Ed.* 3. *Rot.* 2.

Richard the Second, *Anno* 20. farmed out the Subſidy of Cloth in divers Counties.

So *Edward* the Fourth, *Henry* the Eighth, Queen *Elizabeth*, and King *James*; the ſame having been uſed in former Ages even in the beſt governed State, *Rome*, which let out Portions and Decim's to the *Publicans*.

Lane's Rep. *fol.* 22.

The Old Hanſe Towns, *viz.* *Lubeck*, *Collen*, *Brunſwick*, *Dantzick*, and the reſt, had extraordinary Immunities granted unto them by our Third *Henry*, for their great

Aſſiſtance, and furniſhing him in his Wars and naval Expeditions with ſo many Ships; and as they pretended, the King was not only to pay them for the Service of their Ships, but for the Veſſels themſelves in caſe they miſcarried: The King having concluded a Peace, and they being on their return home for *Germany*, the moſt conſiderable Part of their Fleet miſcarried by Storm and Streſs of Weather; for which (according to Covenant) they demanded Reparation. The good King in lieu of that which he wanted, *Money*, granted them divers Immunities; and amongſt others, they were to pay but 1 *per Cent.* Cuſtom, which continued till Queen *Mary*'s Time; and by the Advice of King *Philip* ſhe enhanced the 1 to 20 *per Cent.* the *Hans* not only complained, but clamoured aloud for Breach of their ancient Privileges confirmed unto them by long Preſcription from thirteen ſucceſſive Kings of *England*, and the which they pretended to have purchaſed with their Money. King *Philip* undertook to accommodate the Buſineſs, but Queen *Mary* dying, and he retiring, nothing was effected. Complaints being afterwards made to Queen *Elizabeth*, ſhe anſwered, *That as ſhe would not innovate any thing, ſo ſhe would protect them ſtill in the Immunities and Condition ſhe found.* Hereupon their Navigation and Traffick was ſuſpended a while, which proved very advantageous to the *Engliſh*, for they tried what they could do themſelves herein; their Adventures and Returns proving ſucceſsful, they took the whole Trade into their own Hands, and ſo divided themſelves into Staplers and Merchant-adventurers; the one reſiding conſtant at one place, the other keeping their Courſe, and adventuring to other Towns and States abroad with Cloth and other Manufactures. This ſo nettled the *Hans*, that they deviſed all the ways that a diſcontented People could to draw upon our new *Staplers* or *Adventurers* the ill Opinion of other Nations and States: But that proving but of too ſmall a Force to ſtop the Current of ſo ſtrong a Trade as they had got footing into, they reſorted to ſome other; whereupon they applied themſelves to the Emperor, as being a Body incorporated to the Empire: And upon Complaint obtained Ambaſſadors to the Queen to mediate the Buſineſs: But they returned ſtill *re infecta.* Hereupon the Queen cauſed a Proclamation to be publiſhed, *That the Merchants of the* Hans *ſhould be intreated and*

uſed as all other Strangers within her Dominions in point of Commerce, without any Mark of Diſtinction.

This inflamed them more, whereupon they bent their Forces more eagerly, and in an Imperial Diet, at *Ratiſbone* they procured that the *Engliſh* Merchants, who had aſſociated themſelves in Corporations both in *Embden* and other Places, ſhould be adjudged *Monopoliſts*; whereupon there was a Comitial Edict procured againſt them that they ſhould be exterminated, and baniſhed out of all Parts of the Empire; which was done by *Suderman* a great Civilian. There was there at that time for the Queen as nimble a Man as *Suderman*, and he had the Chancellor of *Embden* to ſecond him, yet they could not ſtop the Edict, whereby our new erected Society of Adventurers were pronounced a Monopoly: Yet *Gilpin* played his Cards ſo well, that he prevailed the *Imperial Ban* ſhould not be publiſhed till after the Diet; and that in the interim his Imperial Majeſty ſhould ſend an Ambaſſador to *England* to advertiſe the Queen of ſuch Proceedings againſt her Merchants. But this made ſo little Impreſſion on the Queen, that the **Ban** grew rather ridiculous than formidable, for the Town of *Embden* harboured our Merchants notwithſtanding, and afterwards the Town of *Stode*; but the *Hanſiaticks* purſuing their Revenge, and they being not ſo able to protect them againſt the Imperial Ban, removed and ſettled themſelves in *Hamburgh*.

This Politick Princeſs, in recompence of their Revenge, commanded another Proclamation to be publiſhed, 'That 'the *Hanſiatick* Merchants ſhould be allowed to trade into '*England* upon the ſame Conditions as they formerly did, 'provided the *Engliſh* Merchants might have the ſame 'Privileges to reſide and trade peaceably in *Stode* or *Hamburgh*, or any where elſe within the Precincts of the *Hans*.' This ſo incenſed and nettled them, that all Endeavours were made to cut off *Stode* and *Hamburgh* from being Members of the *Hans*, or of the Empire: But the Deſign was ſuſpended till they ſaw the Succeſs of 88, King *Philip* having promiſed to do them ſome good Offices in the Concern.

But the Queen finding that the *Hans* were not contented with that Equality ſhe had offered to make betwixt them and her own Subjects, but were uſing ſuch extraordinary

Means, put forth another Proclamation, ‘ That they ſhould ‘ tranſport neither Corn, Victuals, Arms, Timber, Maſts, ‘ Cables, Metals, or any other Materials or Men to *Spain*, ‘ or *Portugal*.’ And not long after the Queen growing more redoubted and famous by the Overthrow of King *Philip*’s Invincible Armado, (as the Pope chriſtened it) the *Hans* began to deſpair of doing any good, eſpecially they having about ſome 60 Sail of their Ships taken about the River *Lisbon* by her Majeſty’s Frigats, that were laden with *Ropas de contrabanda*. She notwithſtanding had Thoughts of diſcharging this Fleet by endeavouring a Reconcilement of the Difference: But ſhe having Intelligence of an extraordinary Aſſembly at *Lubeck*, which had purpoſely met to conſult of Means to be revenged of her, ſhe thereupon made abſolute Prize of thoſe 60 Sail, only two were freed to carry home the ſad Tidings of their Brethrens Misfortune. Hereupon the *Pole* ſent a ranting Ambaſſador in the Behalf of the *Hans*, who ſpake of the Injuries done to the *Hans* in a high Tone. But the Queen herſelf ſuddenly anſwered him in a higher, with a Satisfaction no greater than what ſhe had done to others of the like Quality before.

This fortunate Claſhing for the 19 *per Cent*. on the Cuſtoms, has proved ever ſince advantagious for *England*, our Merchants have ever ſince beaten a peaceful and an uninterrupted Trade into *High* and *Low Germany*; and by their conſtant Trade in thoſe Parts have found a way thro’ the *White Sea* to *Arch-Angel* and *Moſco*. The Return of all which hath ſince vaſtly increaſed the *Riches* and *Strength of this Nation*.

Joſeph. locutus de Pompeio. l. 1. de Bello. Jud. c. 5. p. 720.

V. After the *Jews* became tributary to *Rome*, (which was acquired by *Pompey* threeſcore Years before the Birth of our Saviour) certain Officers or Commiſſioners were appointed by the *Romans* in all thoſe Places where their victorious Standards had claimed a Conqueſt, who uſed to appoint ſuch Officers or Commiſſioners to collect and gather up ſuch Cuſtom-money or Tribute as was exacted by the Senate. Thoſe that gathered up theſe publick Payments were termed *Publicani*, *Publicans*, and by reaſon of their cruel and oppreſſive Exaction, they became hateful in all Nations.

Every

Every Province has its ſeveral Society or Company of Publicans; * every Society its diſtinct Governor: In which reſpect it is that *Zacheus* is called by the Evangeliſts, *Princeps Publicanorum*, the chief Receiver of the Tribute, or chief Publican: And all the Provincial Governors in theſe ſeveral Societies had one chief Maſter or Superintendant reſiding at *Rome*, unto whom the other ſubordinate Governors gave up their Accounts. Theſe Publicans were hated of all the *Roman* Provinces, but eſpecially of the *Jews*, becauſe though it was chiefly maintained by the *Galileans*, yet it was generally inclined unto by the *Jews*, that Tribute ought not to be paid by them. This Hatred is confirmed by the Rabinnical Proverb, *Take not a Wife out of that Family wherein there is a Publican, for ſuch are all Publicans.* Yea, a faithful Publican was ſo rare at *Rome* itſelf, that one *Sabinus*, for his honeſt managing of that Office, in an honourable Remembrance thereof, had certain Images with this Inſcription, Καλῶς τελωνήσαντι *For the faithful Publican.* No marvel that in Holy Writ Publicans and Sinners go Hand in Hand.

* *Sigon. de Antiq. Jur. Civ. Rom. l.* 2. *c.* 4. Luke 13. 2.

Iſ. Cauſabon. Exercit. 3. 37.

Sueton. in Flav. Veſp. cap. 1.

But that moſt excellent Advice of my Lord *Shaftſbury* ought never to be forgot, but to be engraven in the Hearts of the Managers ſo well as over the Door of the *Cuſtom-houſe*, viz.

Let me recommend to you ſo to manage the King's Juſtice, and the Revenues, as the King may have moſt Profit, and the Subject leaſt Vexation. Raking for old Debts, the Number of Informations, Projects upon Concealments, I could not find (in the eleven Years Experience I had in this Court) ever to advantage the Crown; but ſuch Proceedings have, for the moſt part, delivered up the King's good Subjects into the Hands of the worſt of Men, Clerk of the Court, Cuſtom-houſe Officers, and Exciſe-men.

Vide the Earl of *Shaftſbury*'s Speech to Serjeant *Thurland* 1673.

But now the World has been ſo long uſed to them, that in all or moſt Nations the particular Princes or States chuſe out the moſt ſage and prudent Men for that Employment.

VI. Cuſtoms are Duties certain and perpetual, payable to the King as the Inheritance of his Crown, for Merchandizes tranſported from and beyond the Seas from one Realm to another. *Magna Cuſtuma & antiqua* is payable out of

Native Commodities, *ſcilicet*, Wool, Wool-fells, and Hides, and that is certainly impoſed.

And this Cuſtom, which is called *Magna Cuſtuma*, is due to the King of common Right for four Cauſes.

1. For leave to depart the Kingdom, and to carry Commodities of the Realm out of it.

2. For the Intereſt and Dominion which the King hath in the Sea, and the Arms thereof.

3. Becauſe the King is the Guardian of all the Ports within the Realm, & *Cuſtos totius Regni*.

4. For Wharfage and Protection of Merchants upon the Seas againſt the Enemies of the Realm, and Pyrates.

Dyer, 165. VII. The Cuſtom which is called *Parva Cuſtuma*, is a Cuſtom or Duty payable by Merchant Strangers, and begun in the Time of King *Edward* the Firſt, when they granted him, that they would pay to him and his Heirs Three Pence in the Pound for all Merchandizes exported and imported by them, &c. And that the Charter was, and may be of great Uſe, I have here inſerted the ſame, as it was faithfully tranſcribed out of the Roll in the *Tower*.

For Merchant Strangers, concerning Liberties granted to them.

31 *Ed.* 1. *num* 44. *intus.* THE KING, to his Archbiſhops, &c. ſendeth Greeting. Concerning the good Condition of all the Merchants of the Kingdoms, Lands, and Provinces under-written: That is to ſay, *Germany*, *France*, *Spain*, *Portugal*, *Navarre*, *Lombardy*, *Tuſcany*, *Provence*, *Catalonia*; Our Dukedoms of *Aquitain*, *Thoulouſe*, *Turein*, *Flanders*, *Brabant*, and all other Lands, and Foreign Places by what Name ſoever called, coming into Our Kingdom of *England*, and there remaining.

Pro Mercatoribus Alienigenis de Libertatibus eis conceſſis.

REX, Archiepiſc. &c. Salutem. Circa bonum ſtatum omnium Mercatorum ſubſcriptorum, Regnorum, Terrarum, & Provinciarum, videlicet, Alemann. Franciæ, Hiſpaniæ, Portugaliæ, Navarr. Lumbardiæ, Tuſciæ, Provenciæ, Cataloniæ; Ducatus noſtri Aquitann. Tholoſan. Tatureini, Flandr. Brabant. & omnium aliarum terrarum, & locorum extraneorum quocunque nomine cenſeantur, venientium in Regnum noſtrum Angliæ, & ibidem converſantium.

Nos

Nos precipua cura ſollicitat, qualiter ſub noſtro dominio tranquillitatis, & plene ſecuritatis, immunitas eiſdem Mercatoribus futuris temporibus preparetur: Ut itaque vota ipſorum reddantur ad noſtra, & Regni noſtri ſervitia promptiora; ipſorum Petitionibus favorabiliter annuentes, & pro ſtatu eorundem plenius aſſecurando, in forma que ſequitur ordinantes ſubſcripta, dictis Mercatoribus pro nobis & heredibus noſtris in perpetuum duximus concedenda.

We being very ſollicitous, out of Our ſpecial Care, that under our Dominion, a Freedom of Tranquillity, and full Security for the ſaid Merchants may be provided for the future, ſo as they may the more readily apply themſelves to the Service of Us, and of our Kingdom, We graciouſly anſwering their Petitions, and ordaining more amply for ſecuring their Condition in form following under-written, are pleaſed to grant to the ſaid Merchants for Us, and Our Heirs for ever.

Imprimis, Videlicet, quod omnes Mercatores dictorum Regnorum & Terrarum ſalvo & ſecure ſub tuitione & protectione noſtra in dictum Regnum noſtrum Angliæ, & ubique infra poteſtatem noſtram alibi veniant cum Merchandiſis ſuis quibuſcunque, de Muragio, Pontagio, & Pavagio, liberi & quieti, quodque infra idem Regnum & Poteſtatem noſtrum, in Civitatibus, Burgis, & Villis Mercatoriis poſſent mercari, duntaxat in groſſo, tam cum Indigenis ſeu Incolis ejuſdem Regni, & Poteſtatis noſtre predicte quam cum Alienigenis extraneis vel privatis. Ita tamen quod, Merces que vulgariter Merceriæ vocantur ac Species, minuciatim vendi poſſint, prout antea fieri con-

Imprimis, That is to ſay, That all Merchants of the ſaid Kingdoms and Lands, may come from any other Place ſafe and ſecure under Our Tuition and Protection into Our ſaid Kingdom of *England*, and every where within Our Dominion, with their Merchandizes of what ſort ſoever, and be unmoleſted and quiet concerning * Murage, † Pontage, and ‖ Pavage, and that within Our ſaid Kingdom and Dominion, they may traffick in the Cities, Boroughs, and Market-Towns, only in groſs, as well with Natives or Inhabitants of this Our Kingdom and Dominion aforeſaid, as with Strangers, Foreign and Domeſtick: But ſo, as their Wares, vul-

* *Repairing public Walls.*
† *Bridges.*
‖ *Pavements.*

garly called *Mercery*, or the *SPECIES thereof*, they may ſell by Retail, as formerly hath been accuſtomed. And that all the ſaid Merchants may carry, or cauſe to be carried, whither they pleaſe, their Merchandize which they have brought into Our ſaid Kingdom and Dominion, or otherwiſe acquired, except to the Lands of the manifeſt and notorious Enemies of Our Kingdom, paying the Cuſtoms which ſhall be due, Wines only excepted, which ſhall not be exported out of Our ſaid Kingdom or Dominion, after they have been imported into our ſaid Kingdom or Dominion, without our Pleaſure and eſpecial Licence, by any Way or Means whatſoever.

Item, That the ſaid Merchants may lodge in the Cities, Boroughs, and Towns aforeſaid, at their own Pleaſure, and there ſtay with their Goods, to the Content of them who entertain them.

Item, That every Contract made by the ſaid Merchants with what Perſons ſoever, and from what Places ſoever, for what kind of Merchandizes ſoever, ſhall be firm and ſtable, ſo that neither of the Merchants ſhall depart from, or go back from his Bargain, after a *Gods-penny* is given

ſuebit: Et quod omnes predicti Mercatores Merchandiſas ſuas quas ipſos ad predictum Regnum & Poteſtatem noſtram adducere, ſeu infra idem Regnum & Poteſtatem noſtram emere, vel aliàs adquirere contigerit, poſſint quo voluerint, tam infra Regnum & Poteſtatem noſtram predictam, quam extra ducere, ſeu portari facere præterquam ad terras manifeſtorum & notoriorum hoſtium Regni noſtri ſolvendo conſuetudines quas debebunt, Vinis duntaxat exceptis, que de eodem Regno ſeu Poteſtate noſtra, poſtquam infra idem Regnum, ſeu Poteſtatem noſtram ducto fuerint, ſine voluntate noſtra & licentia ſpeciali, non liceat eis educere quoquo modo.

Item, Quod predicti Mercatores, in Civitatibus Burgis predictis pro voluntate ſua hoſpitari valeant, & morari Villis ac cum bonis ſuis, ad gratum ipſorum quorum fuerint hoſpitia ſive domus.

Item, Quod quilibet contractus per ipſos Mercatores cum quibuſcunque perſonis, undecunque genere ſuper quocunque, fuerint Merchandiſæ, initus firmus ſit & ſtabilis; ita quod neuter Mercatorum ab illo Contractu poſſit diſcedere, vel reſilire, poſtquam denarius

inter

inter principales perſonas contrahentes, datus fuerit & receptus. Et ſi forſan ſuper contractu hujuſmodi contentio oriatur, fiat inde probatio aut inquiſitio ſecundum uſus & conſuetudines Feriarum, & Villarum ubi dictum Contractum fieri contigeret, & iniri.

Item, Promittimus prefatis mercatoribus pro nobis, & heredibus noſtris, in perpetuum concedentes. Quod nullam priſam vel arreſtationem, ſeu dilationem occaſione priſæ de cætero de Mercimoniis, Merchandiſis, ſeu aliis bonis ſuis per nos, vel alium, ſeu alios, pro aliqua neceſſitate vel caſu, contra voluntatem ipſorum Mercatorum aliquatenus faciemus, aut fieri patiemur; niſi ſtatim ſoluto pretio pro quo ipſi Mercatores aliis hujuſmodi mercimonia vendere poſſint, vel eis alias ſatisfactio ita quod reputent ſe contentos, & quod ſuper mercimonia, merchandiſas, ſeu bona ipſorum per nos, vel miniſtros ſuos, nulla appreciatio, aut æſtimatio imponetur.

Item, Volumus, Quod omnes Ballivi, & Miniſtri Feriarum, Civitatum, Burgorum & Villarum Mercatoriarum, Mercatoribus antedictis conquerentibus coram eis, celerem juſtitiam

and received between the principal Perſons contracting; and if it happen that a Contention ariſe on the ſaid Contract, there ſhall be a Tryal, or Inquiſition, according to the Uſages and Cuſtoms of the Fairs, and Towns where ſuch Contract ſhall be made or begun.

Item, We promiſe to the aforeſaid Merchants, and for Us, and our Heirs, for ever grant, that we by no means whatſoever will make, nor ſuffer to be made, any Prize, or Arreſt, or Detention by occaſion of Prize, for the future, upon their ſaid Wares, Merchandizes, or other their Goods by Us or by any other, or others in any Caſe and Neceſſity whatſoever, againſt the Will of the ſaid Merchants, without the Price preſently paid, for which the ſaid Merchants might ſell to others Wares of the like ſort for, or otherwiſe to ſatisfy them, ſo as they ſhall repute themſelves contented. And that no Appraiſment or Value ſhall be put upon the ſaid Merchants Wares, Merchandizes, or Goods, by Us or Our Miniſters.

Item, We will, that all Bailiffs, and Officers of Fairs, Cities, Boroughs, and Market Towns, ſhall do ſpeedy Juſtice to the ſaid Merchants, complaining to them, from

Day to Day, without Delay, according to the *Merchants Law*, concerning all and every thing which by the ſaid *Law* may be determined. And if any Defect ſhall happen to be found in any of Our Bailiffs or Miniſters aforeſaid, whereby the ſaid Merchants, or any of their Factors ſhall ſuffer Loſs, although the Merchant recover his Loſſes againſt the Party in the whole, yet nevertheleſs, the Bailiff, or other Miniſters, as the Fault requires, ſhall be puniſhed at our Suit; and we grant the ſaid Puniſhment in favour of the Merchants aforeſaid, for compleating their Right.

Item, That in all kinds of Pleas, ſaving in the caſe of Crime for which the Pain of Death is liable to be inflicted, where the Merchant ſhall be impleaded, or he implead another, of whatſoever Condition he that is impleaded be of, whether a Foreigner or a Domeſtick, in the ſaid Fairs, Cities, or Boroughs, where there is a ſufficient Plenty of Merchants of the Lands aforeſaid, and Inquiſition there ought to be made; half of the Inquiſition ſhall be of the ſaid Foreign Merchants, and the other half of honeſt and lawful Men, where the Plea happens to be: And if a ſufficient

facient de die in diem ſine dilatione ſecundum LEGEM MERCATORIAM, de univerſis & ſingulis que per eandum Legem poterunt terminari. Et ſi forte inveniatur defectus in aliquo Ballivorum vel Miniſtrorum predictorum unde iidem Mercatores, vel eorum aliquis dilectus incommoda ſuſtinuerint, vel ſuſtinuerit, licet Mercator verſus partem in principali recuperaverit dampna ſua, nihilominus Ballivus, vel Miniſter alius verſus Nos, prout delictum exigit, puniatur, & punitionem iſtam concedimus in favorem Mercatorum predictorum pro eorum juſtitia maturanda.

Item, Quod in omnibus generibus placitorum, ſalvo caſu criminis pro quo inſtigenda ſit poena mortis, ubi Mercator implacitatus fuerit vel alium implacitaverit, cujuſcunque conditionis idem implacitatus extiterit, extraneus vel privatus, in Nundinis, Civitatibus, ſive Burgis ubi fuerit ſufficiens copia Mercatorum predictarum terrarum, & inquiſitio fieri debeat, ſit medietas Inquiſitionis de eiſdem Mercatoribus, & medietas altera de aliis probis & legalibus hominibus loci illius, ubi placitum illud eſſe contigerit: Et ſi de Mercatoribus dictarum Terrarum

numerus

numerus non invenatur ſufficiens, ponantur in Inquiſitione illi qui idonei invenientur ibidem, & reſidui ſint de aliis bonis hominibus & idoneis, de locis in quibus placitum illud erit.

Number of the Merchants of the ſaid Lands ſhall not be found, let thoſe be put in the Inquiſition who ſhall be found fit in that Place, and let the Reſidue be of other good and fit Men, in the Places in which that Plaint ſhall be.

Item. Volumus, Ordinamus & Statuimus, Quod in qualibet Villa Mercatoria & Feria Regni noſtri prædicti, & alis infra Poteſtatem noſtram, Pondus noſtrum in certo loco ponatur, & ante ponderationem Statera in præſentia Emptoris & Venditoris vacua videatur, & quod brachia ſint æqualia, & ex tunc Ponderatur ponderet in æquali & cum Stateram poſuerit in æquali, ſtatim amoveat manus ſuas ita quod remaneat in æquam, quodq; per totum Regnum & Poteſtatem noſtram unum ſit pondus & una menſura, & ſigno Standardi noſtri ſignentur, & quod quilibet poſſit habere Stateram unius Quarteroni & infra, ubi contra Dominum loci, aut libertatem per Nos, ſeu Anteceſſores noſtros conceſſam illud non fuerit, ſive contra Villarum aut Feriarum conſuetudinem hactenus obſervatam.

Item, We will, ordain, and appoint, that in every Market-Town, and Fair of our ſaid Kingdom, and elſewhere within our Dominion, *Our Weight* is to be put in a certain Place, and before weighing thereof, the Scale to be empty in the Preſence of Buyer and Seller, and the Arms thereof to be equal; and when he hath ſet the Scale equal, he is forthwith to take off his Hands, ſo that it may remain equal, and that throughout our whole Kingdom and Dominion, there be one Weight and Meaſure, both of them ſealed with the Sign of our Standard, and that every one may have a Scale of one *Quarterom* and under, where, contrary to the Governor of the ſaid Place, or Liberty by Us, or our Anceſtors, it was not granted, or contrary to the Cuſtom of the Villages and Fairs hitherto obſerved.

Item, Volumus & concedimus, Quod aliquis certus homo, & fidelis, & diſcretus London reſidens, aſſignetur Juſtitiarius Mercatoribus me-

Item, We will and grant, that ſome certain, faithful and diſcreet Perſon reſiding in *London*, may be appointed a *Juſtice* in behalf of the

before-mention'd Merchants, before whom they may plead ſpecially, and more ſpeedily recover their Debts, if the Sheriffs and Mayors diſtribute not to them, Day by Day, compleat and ſpeedy Juſtice, that then a Commiſſion be granted to the aforeſaid Merchants, beſides this preſent Charter, *viz.* concerning thoſe [*Goods*] which are to be conveyed between Merchants and Merchants, according to the *Merchants Law.*

moratis, coram quo valeant ſpecialiter placitare, & debita ſua recuperare celeriter, ſi Vicecomites & Majores eis non facerent de die in diem celeris juſtitie complementum, & inde fiat Commiſſio extra chartam preſentem conceſſa Mercatoribus antedictis, ſcilicet, de hiis quæ ſunt inter Mercatores & Mercatores, ſecundum LEGEM MERCATORIAM decouenda.

Item, We ordain and appoint, and our Will and Pleaſure is, for Us and our Heirs, that this Ordinance and Statute be firmly kept for ever, notwithſtanding any Liberty whatſoever which we or our Heirs for the future ſhall grant; the ſaid Merchants ought not to loſe their above-written Liberties, or any of them: And for and in conſideration of their obtaining the ſaid Liberties and free Uſages, and our Priſes to be remitted to them: All and ſingular the ſaid Merchants for themſelves, and all others on their Part, have heartily and unanimouſly granted to Us, that for every *Hogſhead of Wine* which they ſhall bring in, or cauſe to be brought in within our Kingdom or Dominion thereof; and from whence

Item, Ordinamus & Statuimus, & Ordinationem illam Statutumque pro Nobis & Hæredibus noſtris in perpetuum Volumus firmiter obſervari, quod pro quacunque libertate quam Nos vel Heredes noſtri de cætero concedemus, præfati Mercatores ſupra-ſcriptas Libertates, vel earum aliquam non amittant. Pro ſupradictis autem Libertatibus & liberis Conſuetudinibus obtinendis, & Priſis noſtris remittendis eiſdem ſepedicti Mercatores univerſi & ſinguli pro ſe & omnibus aliis de partibus ſuis, Nobis concorditer & unanimiter conceſſerunt quod de qualibet Dolio vini quod adducent, vel adduci facient infra Regnum & Poteſtatem noſtram, & unde Marinariis frettum ſolvere tenebuntur, ſolvent Nobis

Nobis & Heredibus noſtris nomine Cuſtumæ, duos Solidos ultra antiquas Cuſtumas debitas, & in Denariis ſolvi conſuetas, nobis aut aliis infra quadraginta dies poſtquam extra Naves ad Terram poſita fuerint dicta vina.

they are obliged to pay Freight to the Mariners, to pay to Us and to our Heirs, by the Name of Cuſtom, two Shillings over and above the ancient Cuſtoms due, and accuſtomed to be paid in Money within forty Days after the ſaid Wines are put on Shore out of the Ships.

Item, De quolibet Sacco Lanæ, quem dicti Mercatores, aut alii nomine ipſorum ement & de Regno noſtro educent, aut emi & educi facient, ſolvent quadraginta Denarios de incremento, ultra Cuſtumam antiquam dimidiæ Marcæ que prius fuerat perſoluta. Et pro Laſto Coriorum extra Regnum & Poteſtatem noſtram vehendorum dimidiam Marcam, ſupra id quod ex antiqua Cuſtuma antea ſolvebatur; Et ſimiliter de trecentis pellibus Lanutis, extra Regnum & Poteſtatem noſtram deducendis, quadraginta denarios ultra certum illud quod de antiqua Cuſtuma fuerat prius datum.

Item, For every *Sack of Wool*, which the ſaid Merchants or others in their Names do buy, and out of this Kingdom tranſport, or buy to tranſport, ſhall pay forty Pence over and above the ancient Cuſtom of half a Mark, which formerly was paid. And for a Laſt of Hides carried out of this our Kingdom and Dominion thereof to be ſold, half a Mark over and above that, which according to ancient Cuſtom was formerly paid, and likewiſe for three hundred Woolfels to be carried out of this Kingdom, forty Pence, beſides that certain Sum, which according to ancient Cuſtom was formerly given.

Item, Duos Solidos de qualibet Scarleta, & panno tincto in grano.

Item, Two Shillings for every Scarlet, and Cloth dyed in Grain.

Item, Decem & octo denarios de quolibet panno in quo pars grani fuerit intermixta.

Item, Eighteen Pence for every Cloth, in which part of a Grain Colour is intermixed.

Item, Duodecim denarios de quolibet panno alio ſine grano.

Item, Twelve Pence for every other Cloth without Grain.

Item,

Item, Twelve Pence for every Quintal of Wax.

And whereas ſome of the ſaid Merchants deal in other Commodities, as Goods weighed with *Avoir-du-pois* Weights, and in other fine Goods, as Cloth of *Tarſe*, of Silk, of * *Candatis*, of Hair, and in divers other Merchandizes, in Horſes alſo, and other Animals, Corn, and other Wares and Merchandizes of different ſorts, which cannot eaſily be put to a certain Rate of Cuſtom: The ſaid Merchants have conſented to give Us and our Heirs for every Twenty Shillings Eſtimation and Value of thoſe Wares and Merchandizes, by whatſoever Name they be called, three Pence in the Pound, upon the Entrance of their Wares and Merchandizes into our Kingdom and Dominion aforeſaid, within twenty Days after ſuch Wares and Merchandizes ſhall be brought into our Kingdom and Dominion aforeſaid, and there ſhall be unladen, or ſold. And likewiſe three Pence for every twenty Shillings, at the exporting of what kind ſoever of Wares or Merchandizes bought in our Kingdom and Dominion aforeſaid, beſides the ancient Cuſtoms formerly given to Us, or to others.

* *It is ſuppoſed it ſhould be* Sindonibus, *of Lawn, Cambrick, or other fine Linnen.*

Item, Duodecim denarios de quolibet Ceræ quintallo.

Cumque de prefatis Mercatoribus nonnulli eorum alias exerceant Merchandiſas, et de aliis rebus ſubtilibus, ſicut de pannis Tarſen, de Serico, de Cindatis, at Sera, & aliis diverſis mercibus, et de equis etiam, ac aliis animalibus, Blado, et aliis rebus, et Merchandiſis multimodis, quæ ad certam Cuſtumam facile poni non poterunt, iidem Mercatores conceſſerunt dare Nobis et Heredibus noſtris de qualibet libra argenti eſtimationis ſeu valoris rerum et Merchandiſarum hujuſmodi quocunque nomine cenſeantur, tres denarios de libra in introitu rerum, & Merchandiſarum ipſarum in Regnum & Poteſtatem noſtram predictam infra viginti dies poſtquam hujuſmodi Res et Merchandiſæ in Regnum et Poteſtatem noſtram adductæ, et etiam ibidem exoneratæ, ſive venditæ, fuerint. Et ſimiliter tres denarios de qualibet libra argenti in eductione quarumcunque rerum, & Merchandiſarum hujuſmodi emptarum in Regno et Poteſtate noſtra predictis, ultra Cuſtumas antiquas nobis, aut aliis ante datas. Et ſuper valore et eſtimatione rerum et

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Merchandiſarum hujuſmodi, de quibus tres denarii de qualibet libra argenti ſicut prædicitur ſunt ſolvendi; credatur eis per literas quas de Dominis aut ſociis ſuis oſtendere poterunt, et ſi literas non habeant, Stetur in hac parte ipſorum mercatorum ſi præſentes fuerint, vel vallettorum ſuorum in eorundem mercatorum abſentia juramentis.

And over and above the Value and Eſtimation of the ſaid Wares and Merchandizes: for which three Pence for every twenty Shillings as aforeſaid are to be paid; they are to have Credit by Letters, by them to be produced from their Principals or Partners, and if they have none, let it be determined in this caſe, by the Oaths of the ſaid Merchants, or in their Abſence, of their Servants.

Liceat inſuper Sociis de Societate mercatorum prædictorum infra Regnum et Poteſtatem noſtram prædictam, Lanas vendere aliis ſociis ſuis, et ſimiliter emere ab eiſdem abſque Cuſtuma ſolvenda; ita tamen quod dictæ Lanæ ad tales manus non deveniant, quod de Cuſtuma nobis debita defraudemur.

Moreover, It may be lawful for the Society of the Merchants aforeſaid, to ſell Wool to the Fellows of the ſaid Society, and likewiſe to buy the ſame one of another within our Kingdom and Dominion, without Payment of Cuſtom: Provided that the ſaid Wool come not to ſuch Hands whereby we may be defrauded of our Cuſtoms.

Et præterea eſt ſciendum, Quod poſtquam ſæpedicti Mercatores ſemel in uno loco infra Regnum et Poteſtatem noſtram Cuſtumam nobis conceſſam ſuperius, pro Merchandiſis ſuis in forma ſolverint ſupradicta et ſuum habeant inde Warrantum, erunt liberi et quieti in omnibus aliis locis infra Regnum et Poteſtatem noſtram prædictam, de ſolutione Cuſtumæ hujuſmodi pro eiſ-

And furthermore be it known, that after the ſaid Merchants have once in any one Place within our Kingdom and Dominion paid our Cuſtoms granted, as aforeſaid, to Us, for their Merchandizes in form aforeſaid, and thereupon they have their Warrant, they ſhall be free, and unmoleſted in all other Places within our Kingdom and Dominion, from Payment of the ſaid Cuſtom

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for

for the ſame Commodities or Merchandizes by the ſaid Warrant, whether ſuch Merchandizes remain within our Kingdom and Dominion, or are carried out, except Wines which, without our Leave or Licence as aforeſaid, are by no means to be exported out of our Kingdom.

dem Merchandiſis, ſeu Mercimoniis per idem Warrantum, ſive hujuſmodi merchandiſæ infra Regnum et Poteſtatem noſtram remaneant, ſive exterius deferantur, Exceptis vinis que de Regno & Poteſtate prędictis, ſine voluntate et licentia noſtra ſicut predictum eſt, nullatenus educantur.

We will alſo, and for Us, and our Heirs grant, that no Exaction, Priſe or Loan, or any other Burden ſhall be impoſed in any Part or Meaſure on the Perſons of the ſaid Merchants, their Merchandizes, or Goods, contrary to the Form before expreſſed and granted.

Volumus autem, ac pro Nobis & Hæredibus noſtris concedimus, Quod nulla Exactio, Priſa vel Preſtatio, aut aliquod aliud onus ſuper perſonas mercatorum prediſtorum, merchandiſas, ſeu bona eorundem aliquatenus imponatur, contra formam expreſſam ſuperius, & conceſſam.

Witneſs hereto, the Reverend Fathers, *Robert* Archbiſhop of *Canterbury*, Primate of all *England*, *Walter* Biſhop of *Coventry* and *Litchfield*, *Henry de Lacy* Earl of *Lincoln*, *Humphrey de Bohun*, Earl of *Hereford* and *Eſſex*, and Conſtable of *England*, *Adomarus* of *Valentia*, *Galfrid* of *Geynvil*, *Hugh de le Spencer*, *Walter de Bello Campo*, Steward of our Houſe, *Robert* of *Bures*, and others. Given by our Hand at *Weſtminſter* the Firſt Day of *February*.

Hiis teſtibus venerabilibus Patribus Roberto Cantuarienſi Archiepiſcopo totius Angliæ Primate, Waltero Coventr. et Litchf. Epiſcope, Henrie de Lacy, Comite Lincoln, Humfrido de Bohun, Comite Hereford. & Eſſex. ac Conſtabular. Angl. Adomar. de Valentia, Galfrido de Geynvill, Hugone de le Spencer, Waltero de Bello Campo Seneſcallo Hoſpitii noſtri, Roberto de Bures et aliis. Dat. per manum noſtram apud Weſt. primo die Febr.

Upon an Information for not paying of Cuſtom for Linen Cloth, the Caſe was thus: The Defendants were born within

within the Realm, their Father being an Alien, but their Mother was born here, the Queſtion was, whether the Defendants ſo born ſhould pay Aliens Cuſtom or not? Becauſe the Attorney General ſaid, that Directions were lately given in *Scaccario*, that the Iſſue of Aliens for the firſt Generation, ſhould pay Aliens Duties; but here the Defendant's Mother was *Engliſh*, and the Court gave Liberty to find it ſpecially; but the Plaintiff would not inſiſt upon it, becauſe ſome part of the Goods were clearly forfeited, for not paying any Cuſtom at all, or making any Offer to pay it, ſave only by Poſt-entry after Seizure, and a Month lacking 3 Days after the firſt Entry of the Quantity and Parcels at the Cuſtom-Houſe. And a Verdict paſſed for the Plaintiff for that Part only, *Hardreſs*. 335, 336.

Goods conveyed to ſeveral Ports ſhall not pay Cuſtom twice.

If Goods are landed, and the Cuſtom paid at one Port, and afterwards the Goods are conveyed croſs the Land, or by Sea, to another Port, Cuſtoms ſhall not be paid for them at the ſecond Port, and that this is not within the Stat. of 3 *H*. 7. *cap*. 7. 1 *Sid*. 264. *Bruen. v. Roe.*

Bancks had ſeized Cambricks and Hollands, becauſe they were landed at *Dover* without paying Cuſtom; and it was afterwards agreed, that the Owner ſhould pay the Cuſtom, and have his Goods again, and ſo it was done; whereupon an Information was brought againſt *Banks* for the Goods on the Statute 3 *H*. 7. *c*. 7. and he pleaded not guilty, and gave in Evidence, that the Goods were entered in the Cuſtom-Houſe Book. But *per Curiam*, that was no Diſcharge to him for the Miſchief; for then when Goods are forfeited, every body will redeem them by paying Cuſtom: And therefore the Goods being once forfeited ſhall be the King's without Redemption, and the Officer is not diſcharged by delivering them over, as in *Trover*.

Compoſitions with the Farmers for the Forfeiture.

The Plaintiffs were Farmers of the King of his Cuſtoms, and the Defendants brought into Port a Ship with Goods and unladen, the Cuſtoms not paid: After they compounded with the King for the Forfeiture, (which the Farmers had not in their Grant) after the Farmers brought Debt againſt them for the Cuſtom of twelve Pence *per* Pound. The Defendants pleaded this Matter in Bar; and upon Demurrer Judgment *pro Quer*. for this Reaſon, becauſe the twelve Pence in the Pound became a Duty by bringing the Goods into the Haven, and a Chattel veſted. By *Tanfield*, this

Cuſtom is due, when a Ship is brought within an Haven, with intent to unlade there, but not when they are caſt over-board by Tempeſt. *Salter* and *Garraway* againſt *Malapert*. 1 *Rolls Rep*. 383.

Duty for Salt taken as Prize.

Salt taken from a *Spaniard* by a *Dutchman*, by Commiſſion from *Scotland*, and brought into *Scotland*, and from thence into *England*, the Duty ſhall be paid for it as *Scotch* Salt: But if it had been taken by *Engliſh* Commiſſion, and only put into *Scotland*, it ſhould pay as *Engliſh* or Foreign Salt, within the Meaning of the Statutes of the 12 *Car*. 2. *cap*. 18. *Sect*. 16. and 14 *Car*. 2. *cap*. 11. *Sect*. 38.

3 *Keb*. 510.

Sir *John Davies* in the Caſe of *Cuſtoms*.

VIII. Subſidy is a Duty payable for Merchandizes exported and imported, granted by Act of Parliament for the Life of the King. And are,

1. Aids and Subſidies payable out of Native Commodities exported and imported.

Vide the Stat. 12 *Car*. 2. of Tunnage and Poundage.

2. *Tunnage*, which is a Subſidy out of Wines of all ſorts; and *Poundage*, which is a Subſidy granted out of all Commodities exported and imported, except Wines and ancient Staple Commodities, and is the twentieth Part of the Merchandize, Impoſts or Duties payable for Merchandizes rated and aſſeſſed by Parliament; and then they are in the Nature of Subſidies impoſed by the King's Prerogative.

The Rates are generally agreed on by the Commons Houſe of Parliament, and are expreſſed in a Book commonly called the *Rates of Merchandize*; that is to ſay, the Subſidy of Tunnage and Poundage, and the Subſidy of Woollen Cloaths or old Drapery, and are ſubſcribed with the Hand of the Speaker.

IX. All Merchant-Strangers bringing in any ſort of Wines, are to pay thirty Shillings on the Tun over and above the Rates which the Natives pay, including twenty Shillings the Tun formerly paid to his Majeſty by the Name of *Southampton* Duties, for all Wines of the Growth of the *Levant*; for which ſort of Wines, the Stranger is alſo to pay to the Uſe of the Town of *Southampton* for every But or Pipe Ten Shillings.

Vide in tit. Priſage.

Aliens are likewiſe to pay the ancient Duty of Butlerage, which is Two Shillings *per* Tun.

Directions in Tunnage.

Rule, *That all ſuch Wines as ſhall be landed in any of the Out-Ports, and Cuſtom paid, and afterwards brought to the Port of* London *by Certificate, ſhall pay ſo much more*

Cuſtom

Cuſtom as they paid ſhort of the Duty due in the Port of London.

For every Tun of Beer to be exported in ſhipping *Engliſh* built in Money muſt be paid Two Shillings: And for every Tun of Beer exported in any other Shipping in Money Six Shillings. Directions in Poundage.

X. If there ſhall happen to be brought or carried out of this Realm any Goods liable to the Payment of Cuſtom and Subſidy which are omitted in the Book of Rates, or are not now uſed to be brought in or carried out, or by reaſon of the great Diverſity of the Value of ſome Goods could not be rated; in ſuch caſe every Cuſtomer or Collector for the Time being, ſhall and may levy the ſaid Cuſtom and Subſidy of Poundage according to the Value and Price of ſuch Goods to be affirmed upon the Oath of the Merchant in the Preſence of the Cuſtomer, Collector, Comptroller and Surveyor, or any two of them.

XI. Every *Engliſhman* ſhall pay for every ſhort Cloth containing in length not above 28 Yards, and in Weight not above 64 lb. white or coloured, by him to be ſhipped and carried out of this Kingdom, Three Shillings Four Pence, being after the Rate of Two Farthings and half a Farthing *per* Pound Weight. Directions for the Payment of the Subſidy upon Woollen Cloth, or old Drapery.

And ſo after that rate for all other ſorts of Cloths of greater Length and Weight, allowing not above Twenty-eight Yards, and Sixty-four Pound to a ſhort Cloth; that is to ſay, for every Pound Weight over and above Sixty-four Pound, two Farthings and a half Farthing: And for all other ſorts of leſſer Cloths to be allowed to a ſhort Cloth; that is to ſay, every Stranger ſhall pay for every ſhort Cloth *cont.* in length not above 28 Yards, and in Weight not above 64 lb. white or coloured, by him to be ſhipped or carried out of this Kingdom, Six Shillings Eight Pence, beſides the old Duty of One Shilling and Two Pence.

And ſo after that rate for all other ſorts of Cloths of greater Length and Weight; and for all ſorts of leſſer Cloths to be allowed to a ſhort Cloth; that is to ſay,

Dorſet and *Somerſet Dozens*, *Rudge-waſhed*, *Cardinals*, *Pin-whites*, *Straits*, *Statuets*, *Stockbridges*, *Taveſtock*, ſeven of each ſort ſhall be allowed to a ſhort Cloth.

Tauntons,

Tauntons, *Bridgwaters*, and *Dunſtars*, the fifty not exceeding 64 lb. in Weight; *Devon*. Dozens containing 12 or 13 Yards, in Weight 13 lb. five to be allowed to a ſhort Cloth.

Ordinary *Pennyſtones*, or *Foreſt Whites cont*. between 12 or 13 Yards, and in Weight 28 Pounds, *Shorting Pennyſtones cont*. 13 or 14 Yards, and in Weight 35 Pounds unſeized, four to be allowed to a ſhort Cloth.

Narrow *Yorkſhire* Kerſies Whites and Reds, *cont*. not above 17 or 18 Yards, and in Weight 22 Pound. *Hampſhire* ordinary Kerſies, *Newberry* Whites, and other Kerſies of like making *cont*. 24 Yards, and in Weight 28 lb. Sorting *Hampſhire* Kerſies *cont*. 28 Pound, and in Weight 32 Pound; three of them to make a ſhort Cloth.

Northern Dozens, ſingle ſorting *Pennyſtones cont*. between 13 and 15 Yards, and in Weight 53 Pound frized, two of them to make a ſhort Cloth.

And the Northern Dozens double, one to be accounted for a ſhort Cloth.

All which ſhall go and be accounted for ſhort Cloths, and ſhall pay after the rate of the ſhort Cloth before rated, and for over-weight two Farthings and One-half the Pound.

The new ſort of Cloth called the *Spaniſh* Cloth, otherwiſe Narrow Liſt, Weſtern Broad Cloth not exceeding 25 Yards in Length, and 43 Pounds in Weight, to be accounted Two-thirds of the ſhort Cloth before rated.

And for every Pound Weight exceeding 43 Pounds, Two Farthings and half Farthing the Pound Weight.

Cloth Raſhes, *alias* Cloth Serges, *cont*. 30 Yards weighing 40 Pounds, to be accounted Two-thirds of the ſhort Cloth before rated.

And for every Pound exceeding 40 Pound Weight, Two Farthings and half a Farthing the Pound Weight.

And for any other ſort of Woollen Cloth of the Old or New Drapery, and not mentioned in that Book, to pay Two Farthings and half a Farthing the Pound Weight: And for any other ſort of Woollen Cloth of the Old or New Drapery, and not mentioned, is to pay Two Farthings and half a Farthing for the Subſidy of every Pound thereof.

By the Book of Rates annexed to the Act of Tunnage, and Poundage 5 *l. per Cent.* are allowed to the Merchants out of the Subſidy for Poundage, and 10 *l.* more for ready Money:

Money: And whereas 12 *d.* in the Pound is due and payable to the King for Poundage, 6 *d.* in the Pound more is given by another Act called the Additional Duty. And whether or not 5 *l. per Cent.* ſhall be allowed out of this Additional Duty, or not, was the Queſtion. *Per Curiam,* 5 *l. per Cent.* ought to be allowed out of the Additional Duty, as well as out of the 12 *d. per* Pound; for it appears in divers Places of the Book of Rates, that 6 *d.* in the Pound is looked upon as part of the Subſidy of Poundage, and 5 *l.* is to be allowed out of all Subſidies. The Book of Rates is incorporated into the Act of Parliament, and is part of it, ſo that whatever is there muſt be taken as compriſed in the Body of the Act itſelf.

Papillion, v. Sir *John Harriſon. Hardreſs* 349.

Since our Author wrote, there have been ſeveral ſevere Statutes againſt running uncuſtomed Goods; but as it would too much enlarge this Work to give Abſtracts of them here, we ſhall do little more than refer to thoſe of them which are moſt remarkable; the rather, becauſe the Offences cognizable by them are moſtly at Land, and triable by the Courſe and in the Courts of the Common Law.

By Statute 5 *Geo.* I. *chap.* 21. §. 34, 35. If Perſons armed, tumultuouſly aſſembled, to the Number of Eight or more, forcibly hinder, beat or wound an Officer of the Cuſtoms in the due Execution of his Office, they are to be tranſported, not exceeding ſeven Years; and returning within that Time is Felony without Benefit of Clergy.

The Statute 9 *Geo.* II. *chap.* 35. was a kind of general Pardon to all Offenders concerning the Cuſtoms; it enumerates many Offences, and acquits all Perſons guilty of them; but under ſome Reſtrictions, *viz.* any Perſon receiving the Benefit of that Act for any of the Offences which made him liable to Tranſportation, will be a Felon without Clergy, if he again commits any ſuch like Offence.

And by the ſame Act three or more Perſons armed, who aſſemble to aſſiſt in running, *&c.* uncuſtomed Goods are Felons, and to be tranſported for ſeven Years; and returning within that Time is Felony, *ſans* Clergy.

CHAP. XIII.

Of Impoſitions Subſequent, Conditional, Temporary, &c.

I. *Of Impoſitions on the Manufactures of* France, *by* Lex Talionis.
II. *On Vinegar, Perry, Cyder, and Rape, Cuſtoms payable by Deniſons and Strangers, and Logwood made importable.*
III. *On Ships that have not two Decks, and 16 Guns.*
IV. *On Salt, Beer, Cyder, Perry, Vinegar, a further Duty.*
V. *Of the Duty called* Coynage, *and upon what impoſed; and the temporary Impoſition called the Additional Duty.*
VI. *Of Goods particularly imported by Aliens; and Rules for petty Cuſtoms, and other Matters relating to Duties.*
VII. *Of Aliens Cuſtoms on Fiſh and other Commodities, and Rates upon the ſame.*
VIII. *Impoſitions on Foreign Liquors, and Rates on the ſame.*
IX. *Of Native Commodities, and ſuch as were formerly prohibited, may be tranſported, paying certain Duties.*
X. *Beer,* &c. *Exported; Skins, Leather,* &c. *tranſportable, paying certain Duties—Bullion and Coin only excepted.*
XI. *Of Species importable by any Nation.*
XII. *Of great and leſſer Officers Fees, and of Goods not paying out Pound Cuſtom in or out, what Fees to be taken.*
XIII. *Voluntary Gifts from ſome eſteemed no Bribes; and Rates about Payment of Fees.*
XIV. *Of Allowances for Jury, what.*

Subſequent Impoſitions to the Act of Tunnage and Poundage, and the Book of Rates.

12 *Car.* 2.

I. THERE are ſeveral Duties impoſed ſubſequent to the Duties payable by the Book of Rates, and over and above the ſame; that is to ſay, on all Ships belonging to the *French* King's Subjects, which ſhall lade or unlade any Goods in this Kingdom, or ſet on Shore or take in any Paſſenger, or pay 20 *s. per* Tun: This was in Return for the *French* King's impoſing the Value of 50 *Sols* on every *Engliſh* Ship; this Complement laſted but three Weeks longer than the *French* King's; his removed, ours drops.

This collected as the Tunnage and Poundage is directed.

II. So likewiſe on Vinegar, Perry, Rape, Cyder, and Cyder-eager imported from Foreign Parts *per Engliſh*, ſhall anſwer Six Pounds Ten Shillings *per* Tun; if by Strangers, then but Six Pounds.

14 *Car.* 2. *c.* 11. For preventing of Frauds.

But if they ſhall export, then Three Pounds Ten Shillings *per* Tun ſhall be repaid to the *Engliſh*, and Four Pounds Fifteen Shillings to be repaid to Strangers.

 The

The Statute of *Eliz.* prohibiting the Importation of Logwood, repealed; and the ſame may be imported, paying 5 *l. per* Tun: And in caſe of Exportation, then to be repaid 4 *l. per* Tun. 14 *Car.* 2. *c.* 11.

III. The Parliament taking likewiſe again into conſideration the Encouragement of Trading in Ships of Force, have impoſed on all Goods and Merchandize imported and exported from and to the Mediterranean Sea, beyond *Malaga*, in any Ship that hath not two Decks and Sixteen Pieces of Ordnance mounted, and two Men to each Gun, to pay over and above the Rates impoſed by the Book of Rates one *per Cent.* This does not extend to Ships laden with Fiſh, or half laden with Fiſh and other Commodities. 14 *Car.* 2. *cap.* 11.

IV. So likewiſe on Salt out of *Scotland* into *England*, One half-penny *per Gallon.*

Again, there is impoſed on Wines, Vinegar, Cyder and Beer, Ten Shillings *per* Tun; and on Brandy and Strong-waters Twenty Shillings *per* Tun. For the Coinage Duty, the Monies that ariſe on this Duty, are to be paid at the Cuſtom-Houſe to the Collectors and Officers, to be by them kept apart from all other Monies, and paid quarterly into the *Exchequer* without Salary or Fee: The Goods are forfeitable for Non-payment of this Duty; and the ſame is to be repaid, if the Goods are tranſported within one Year. 18 *Car.* 2. *cap.* 5.

V. There was likewiſe an Impoſition of 12 *l. per* Tun on *Spaniſh* Wines, and 8 *l. per* Tun on *French* Wines and Vinegar, which was but temporary, and ended the 24th of *June* 1678. 22 *Car.* 2. *c.* 3.

VI. There are alſo Duties payable by all Aliens for Goods imported in Aliens Ships, commonly called *Navigation Duties.* *Per* Act of Nav. 12 *Car. cap.* 18. *Vide* the Statutes and the particular Commodities enumerated there.

So likewiſe all Goods of the Growth, Product, or Manufacture of *Muſcovia* or *Ruſſia*, and alſo of *Turkey.*

Note, That in all caſes where petty Cuſtom inward is payable, it is to be underſtood of the fourth Part of the full Subſidy, according to the Rates and Value in the Book of Rates, before the 5 *l. per Cent.* is deducted. *Rule.*

Note, Wines of all ſorts imported are to pay Aliens Duties. *Rule.* *Vid.* the Table of Strangers Duties upon Wines.

Note, That the Neat Subſidy of Vinegar, Perry, Rape, Cyder, and Cyder-eager both in *London* and Out-Ports, is the ſame with the Subſidy of *French* Wines, payable in *London.* 14 *Car.* 2. *Vid* Table of *French* Wines

Act of Navigation, 12 Car. 2. c. 18. Act of Trade, 15 Car. 2. c. 7. VII. So likewiſe there is a further Impoſition called Aliens Cuſtom for all Fiſh, Oil, Blubber, Whale-bone, or Whale-fins, not being caught in Veſſels belonging to *Engliſh* Men, are to pay double Strangers Cuſtom.

Vide Stat. and the Particulars enumerated. So likewiſe Cuſtom and Impoſt to be paid for ſeveral ſorts of ſalted or dried Fiſh not imported in Ships *Engliſh* built, or belonging to *England*, and not having been ſtifled and caught in ſuch Ships.

Rule. Upon which ACT, *Note*, That the 5 *l. per Cent.* is not to be allowed of the Petty Cuſtom.

12 Car. 23, 24. 22 Car. 2. 4. VIII. There is likewiſe an Exciſe or Impoſt upon Foreign Liquors imported; that is to ſay, Beer or Ale 6 *s. per* Barrel; Cyder or Perry the Tun Ten Shillings; Brandy or Strong-waters perfectly made, 8 *d. per* Gallon.

15 Car. c. 11. If any of thoſe Goods be landed before thoſe Duties be fully paid, and Warrant ſigned, and without Preſence of an Officer, they are forfeited, to the Informer half.

IX. There are likewiſe Duties impoſed on ſeveral Commodities Exported by ſeveral Acts of Parliament ſubſequent to the Act of Tunnage and Poundage.

Act for Trade, 15 Car. 2. cap. 7. Coals tranſported in *Engliſh* Shipping and Navigation for his Majeſty's Plantations, in lieu of all Cuſtom, ſhall pay only for one Chaldron of *Newcaſtle* Meaſure 1 *s.* 8 *d.* For one Chaldron *London* Meaſure 1 *s.* provided good Security be given for landing the ſaid Coals accordingly.

Act for Tillage, 22 Car. 2. cap. 3. There are likewiſe ſeveral Native Commodities and Cattle prohibited by divers Acts of Parliament not to be tranſported unleſs ſold under ſuch Prizes; but *non obſtante* they may now be exported, paying Cuſtom according to the Book of Rates.

22, 23 Car. 2. 20 Car. 2. cap. 5. X. There is likewiſe an Impoſition on Beer, Ale, and Mum to be exported, to pay 1 *s. per* Tun and no more; but this is but *pro tempore* for Six Years.

20 Car. 2. cap. 5. So likewiſe Leather of all ſorts, Sheep-ſkins, Calve-ſkins, tanned or dreſſed, *non obſtante* any former Law, paying for each hundred Weight *cont.* 112 *l.* Weight One Shilling and no more: This ended on the *25th of March* 1675. and both of them to the End of the next Seſſions of Parliament after.

Act for Trade, 15 Car. 2. cap. 7. Likewiſe all ſorts of Foreign Coin or Bullion of Gold or Silver may be Exported without paying any Duty or Fee for the ſame, Entry being firſt made in the Cuſtom-houſe;

the

the like for Diamonds, Precious Stones, Jewels, and Pearls of all ſorts.

XI. All Perſons whatſoever may import from any Place beyond Sea in *Engliſh* Ships, Mace, Nutmegs, Cinamon, Cloves into *England*, *Wales*, *Jerſey*, *Guernſey*, paying the Cuſtoms thereof. Provided before the lading thereof they give notice to the Commiſſioners or Farmers of the Cuſtoms, of the Quantity and Quality they intend to lade, with the Name of the Veſſel in which they intend to import the ſame, and procure a Licence under the Hands of the ſaid Farmers or Commiſſioners, or any three of them for the importing the ſame. *Proclam. Car. Regis, Dec.* 20. 1662. *Aug.* 26. 1663. But ſee 14 Car. 2. concerning Cuſtoms.

Note, If Goods are wrecked, and the Lord ſeizes them, yet they ought not to pay Cuſtom. * So held by Three Juſtices; *contra*. Chief Juſtice *Treby*, *Trin.* 11 *W.* 3. *Co. Pl. Courtrey* againſt *Bower*.

* Sir *Francis Moor*'s Report *fol.* 224. Lord *Cobham*'s Caſe. The like not long ſince adjudged in the *Common Pleas* (on a ſpecial Verdict found at St. *Edmond*'s-*Bury* in *Suffolk*) *about Mich.* 25, or *Hill.* 25, & 26 *Car.* 2.

XII. Fees and Allowances due and payable to the Officers of his Majeſty's Cuſtoms and Subſidies in the Port of *London*, and the Members and Creeks thereunto belonging; that is to ſay, to the Officers of the Petty Cuſtoms Outwards, Subſidy Outwards, Petty Cuſtoms Inwards, Subſidies Inwards; Great Cuſtoms, Clerks Fees Inwards and Outwards, the King's Waiters being in number Eighteen, the Regiſter of the King's Warrants, the Uſher of the Cuſtomhouſe, Gaugers of *French* Veſſels, chief Searcher, and his Majeſty's five under Searchers in the Port of *London*; and the two Searchers at *Graveſend*, were all ſet and entred in a Table; the ſame was ſettled by the Commons Houſe of Parliament, and ſigned by the Right Honourable Sir *Edward Turner*, late Lord Chief Baron of his Majeſty's Court of *Exchequer*, and then Speaker to the Commons Houſe of Parliament; at which time the Queſtion being put, that for all Goods not paying One Pound Cuſtom in or out, there ſhall be but half Fees taken for all Cocquets, Warrants, Debentures, Tranſires, or Certificates, it was reſolved in the Affirmative. *Virtute cujuſdam Ordin. à Dom. Com. Sabbati* 17 *Maij*, 14. *Car.* 2. *Regis.*

XIII. Societies or Companies trading in a joint Stock, and making but one ſingle Entry, the Adventurers being many, the Table of Fees does not hinder, but the Officers

and Waiters may receive ſuch Gratuity as the Company voluntarily give.

All Goods under the Value of 5 *l.* in the Book of Rates, paying Subſidy the Sum of 5 *s.* or leſs, ſhall paſs without Payment of Fees.

Engliſh Merchants that ſhall land out of one Ship at one time, (although the Receipt of the Subſidy be diſtributed into ſeveral Offices) ſhall not pay any more than for a ſingle Entry.

The Goods of Partnerſhip to paſs as if the Propriety were in one ſingle Perſon.

Fiſh by *Engliſh* in *Engliſh* Shipping or Veſſels Inwards or Outwards all along the Coaſt, to pay no Fee.

Poſt-entries Inward to paſs without Fee under Five Shillings; if above Five Shillings, and under forty Shillings, then Sixpence: But if the Cuſtom to be paid exceed 40 *s.* then full Fees.

The Merchant ſhall pay for all Goods opening that ſhall be ſhort entred above 10 *s.* Cuſtom.

The Merchant ſhall pay for weighing of all Goods that ſhall be ſhort entred above 20 *s.* Cuſtom.

The Merchant is not to be at any Charge, if duly entred.

Tare and Tret, the firſt is the Weight of the Caſk, or Bale, or Covering, wherein Goods are packed; the other is a Conſideration allowed in the Weight for emptying and reſelling the Goods.

XIV. There is likewiſe to be allowed to the Merchants a certain Abatement called *Tare*, for Goods and Merchandize, the which is reduced into a Table, and cannot be deviated from in any caſe within the Port of *London*, without ſpecial Direction of the Commiſſioners or Farmers; or in their Abſence of the Conſent of the General Surveyors and Surveyor of the Ware-houſe, or of two of them at the leaſt, whereof the Surveyor of the Ware-houſe to be one; and in the Out-Ports not without the Conſent and Advice of the Collector and Surveyor: Or where there is no Surveyor, by the Collector himſelf, giving ſpeedy Notice to the Commiſſioners or Farmers of the Reaſon of ſo doing.

CHAP.

CHAP. XIV.

Of Scavage, Package, Porterage, Water-Baillage, Ports, Members, Creeks, the Port of London, and Places lawful to lade and unlade in.

I. Scavage, *what, where payable, and to whom.*
II. *Who pay the ſame, and how regulated and governed.*
III. *Goods omitted in the* Scavage *Table of Rates, how to pay.*
IV. *Of* Package, *how governed, and where payable.*
V. *Where Strangers ſhall pay as of old.*
VI. *Of Packers, Water-ſide Porters, what Duties Strangers are to pay for ſhipping out their Goods.*
VII. *Of the Duty of Water-Baillage.*
VIII. *Of Ports, Members, and Creeks; what are meant and underſtood by them as in reference to action, lawful or unlawful.*
IX. *The ſeveral Ports, Members and Creeks in* England, *and* Wales.
X. *Of the Extent of the Port of* London.
XI. *Of the ſeveral* Keys, Wharfs, *and other Places lawful for landing of Goods.*
XII. *What Goods are excepted, which may be ſhipped or landed at other Places.*

I. *SCAVAGE* is an ancient *Toll* or *Cuſtom* exacted by Mayors, Sheriffs, *&c.* of Merchant-Strangers for Wares ſhewed or offered to Sale within their Precincts, which is prohibited by the Statute of 19 *H.* 7. *cap.* 8. in a Charter of King *Henry* the Second to *Canterbury*, it is written Scewinga.

The City of *London* ſtill retains the Cuſtom, of which in an old printed Book of the Cuſtoms of *London* it is there mentioned, and how to be diſpoſed; of which Cuſtom, halfen del apperteyneth to the Sheriffs, and the other halfen del to the Hoſtys, in whoſe Houſes the Merchants been lodged; And it is to wet that Scavage is the Shew, by Cauſe that Merchants ſhewen unto the Sheriffs Merchandizes of the which Cuſtoms ought to be taken ore that any there be sold, &c.

22 *H.* 8. *c.* 8. II. The *Scavage* that is taken conſiſts of two Parts, that which is payable by Denizens, and that which is required of Aliens: And that all Perſons ſubject to ſuch Duties might not be impoſed upon, there are Tables mentioning the particular Duties ſet up and approved by the Lord Chancellor, Treaſurer, Preſident, Privy-Seal, Steward, and two Juſtices of the *King's-Bench* and *Common-Pleas*; and by them ſubſcribed, or any four of them at leaſt: The which Duties are on *Goods* Inwards and Outwards.

Per Order of K. *Charles* I. ſubſcribed by *William* Lord Biſhop of *London*. *H* Earl of *Mancheſter*, L. C. J. *Brampſton*, and Lord *Littleton*.

III. *Note*, All Goods mentioned in the Table of *Scavage*, and not mentioned in the Table of Rates, ſhall pay after the Rate of One Penny in the Pound, according as they are expreſſed and valued in his Majeſty's Book of Rates, and all others not expreſſed therein, ſhall pay the ſame Rates according to the true Value.

Note, That all private Baulks 8 Inches ſquare and upwards, are by the 23d Article annexed to the Book of Rates reputed Timber, and valued at 3 *d.* the Foot, 50 Foot making one Load, the Value of which is 12 *s.* 6 *d.* and the Subſidy for one Load $\frac{5}{8}$ of One Penny, or One Half-penny and half One Farthing, out of which the 5 *per Cent.* is to be deducted.

IV. There is likewiſe another Duty called *Package*, the which is likewiſe ſet and rated in a Table, and the which is taken of all the ſeveral Commodities therein mentioned.

All Goods not mentioned in that *Table*, are to pay for *Package* Duties, after the Rate of One Penny in the Pound, according as they are expreſſed or valued in his Majeſty's Books of Rates, and all others not expreſſed therein ſhall pay the ſame Rate according to their true Value.

For every Entry in the Packer's Book for writing Bills to each Entry Outward, as uſually they have done, 12 *d.*

V. The Strangers are to pay the labouring Porters for making up their Goods, at their own Charge, as always they have done.

Strangers are likewiſe to pay the Water-ſide Porters belonging to the Package Office, ſuch Fees and Duties for Landing and Shipping their Goods, as they uſually have done within theſe ten Years.

VI. The Packers Water-ſide Porters have Tables of Duties for landing of Strangers Goods, and for the Shipping out their Goods; and Goods not mentioned in the Table

are

are to pay Portage Duties as other Goods do of like Bulk or Condition therein expreſſed.

VII. There is another ancient Duty called *Water Baillage*, which the City of *London* have received time out of Mind, *viz.* for all Goods and Merchandizes imported as well from any Port within the Realm to the Port of *London*, as from any Part out of the Realm to the ſame, and ſo the like Duties (with ſome Variances) for all ſuch Goods as ſhall be exported from the Port of *London* to any other Port within the Realm, ſo likewiſe without: Of this Duty all the Citizens and Freemen of the City are exempted; and though the ſame is very ancient, * and was once but ſmall, in regard, within Memory, it was looked upon as an Honour for a Merchant to be a Citizen of *London*, and ſo conſequently freed; but now, eſpecially ſince the late Wars, abundance of Perſons eminent both for Honours and Eſtates being unwilling to entangle themſelves in the publick Affairs of the City, do refuſe abſolutely to accept of the Freedom of the ſame, ſince which there have been great Conteſts with thoſe Traders; and though the Coaſt Duties have been agreed to, yet the Foreign now ariſing to ſome conſiderable Value, is highly diſputed. And though Charters, Acts of Parliament, Common-Councils, continued Tracts and Foot-ſteps of ancient Evidences and Records are yet extant to evince and make out the moſt apparent Title that may be, the ſame nevertheleſs labours under the greateſt Difficulty amidſt the Diviſions of its Proprietors.

* 5 *July*, 1 *Joh.* 7 *R.* 2. *num.* 37.

1 *Aug.* 21 *R.* 2. entred in the City-Book called *Dunthorn*, *fol.* 96. & 97. Repertory *ult. Aug.* 1. 9 *H.* 1. 2 *Oct.* 3 *Jac.* &c.

VIII. Port, or *locus publicus*, are thoſe Places to which the Officers of the Cuſtoms are appropriated, and which contain and include all the Privileges and Guidance of all Members and Creeks thereunto allotted.

Portus qua publicus non ſolum mercibus exonerandis inſervit, ſed ut naves ibi tutum receptaculum habeant, & jure debito ac ſecuritate fruantur Navigantes, quatenus innocuum iter & ſtationem quærunt. Hinc Portus & Navalia privilegio pacis publicæ gaudent. Arg. 1. *Leg.* 1. §. *ſtationem D. de flum. cap.* 2. *Jur. Nautic. Sued. c.* 1. § 1. 4 *H.* 4. 20.

Members are thoſe Places where anciently a Cuſtom-houſe hath been kept, and Officers or their Deputies attending, and are lawful Places of Exportation or Importation.

Creeks are Places where commonly Officers are or have been placed by way of Prevention, not out of Duty or Right of Attendance, and are not lawful Places of Exportation or

2 Importation

Importation without particular Licence or Sufferance from the Port or Member under which it is placed.

Portus eſt concluſus locus quo importantur merces & exportantur, l. 59. *de verb. Sign. Alias ſtatio, quod ibi tuto naves ſtare poſſint, leg.* 1. § 13. *D. de flum.*

IX. The ſeveral Ports and Members as now they account at the *Cuſtom-houſe*, are,

Ports.	Members:	Creeks.
London.		*Graveſend.*
Ipſwich.	*Malden.*	*Leigh.* *Burnham:* *Weſt Merſey.*
	Colcheſter.	*Eaſt Merſey.* *Brickley.* *Wivenhoe.*
	Harwich.	*Maintree.*
Yarmouth.	*Woodbridge.*	
	Aldborough.	*Orford.* *Dunwick.*
	Southwold.	*Walderſwich.*
	—	*Leſtoffe.*
	Blackney and *Cley.*	
Lynn Regis.	*Wells cum Burnham.*	
	Wisbech.	*Hitcham.* *Croſs Keys.*
Boſton.		*Spalding.* *Foſdick.* *Wainfleet,* *Numby Chapel.* *Thetlethorp.* *Salt-fleet.*
Hull.	*Grimsby*	*Gainthorp.*
	Bridlington.	
	Scarborough.	

Newcaſtle

Ports.	Members.	Creeks.
Newcaſtle upon Tyne.	*Whitby.*	
	Stockton.	*Middleborough.*
	Hartlepool.	
	Sunderland.	
	Shields.	
	—	*Seaton delaval.* *Blith nooke.*
Berwick.	—	*Aylemouth.* *Warnewater.* *Holy Iſland.* *Eaſt Marches*, containing the Coaſt of *Northumberland*, bordering on *Scotland.*
Carliſle.	—	*Weſt Marches*, containing the Coaſt of *Cumberland*, bordering on *Scotland.*
	Whitehaven.	*Workington.* *Ravinglas.* *Milnthorpe.*
Cheſter.	*Lancaſter.*	*Pyte of Fowdery.* *Graunge.*
	Poulton.	*Wyrewater.* *Preſton* and *Rible Water.*
	Liverpool.	*Sankey* Bridge. *Fradſham.* *South* Shore of the River of *Merſey* to the Red Stones.

Cheſter.

Ports.	Members.	Creeks.
Cheſter.	—	*Hilbree.*
		Dawpool.
		Neſton.
		Buttonhead.
		Baghill.
		Moſtin.
	Aberconway.	
	Bewmaris.	*Amlogh.*
	Caernarvon.	*Barmouth.*
	Conway.	
	Holyhead.	
	Pulbelly.	
Milford.	*Aberdovy.*	*Aberuſtab.*
	Cardigan.	*Newport.*
		Fiſcard.
	Pembroke.	*Haverford Weſt.*
		Tenby.
		Carmarthen.
		Laneltby.
		North Burrys.
Cardiffe.	*Swanzey.*	*South Burrys.*
		Neath or *Briton-Ferry.*
		Newton.
	—	*Aberthaw.*
		Penarth.
		Newport.
		Chepſtow.

Gloceſter.

Ports.	Members.	Creeks.
Gloceſter.		River *Severn* from *Bridge-North* to *King-Road.*
Briſtol.		*Pill.*
		Uphill.
Bridgwater.	*Minhead.*	
Plymouth.	*Padſtow.*	
	St. Ives.	
	Penſance.	
	Gweeke.	
	Falmouth.	*St. Maures.*
	Fowey.	
	Lowe.	
	Penryn.	
	Truro.	
		Saltaſh.
		Stonehouſe.
		Couſland.
Exeter.	*Ilfracomb.*	
	Barnſtable.	*Clovelly.*
		Appledore.
	Biddeford.	
		Tincomb.
		Starcroſs.
		Bear and *Seaton.*
		Topſham.
		Pouldram.
		Sydmouth.
		Lympſon.
		Exmouth.
		Aylmouth.

Ports.	Members.	Creeks.
Exeter.	*Dartmouth.*	*Saltcomb.* *Brixham.* *Torbay.* *Totnes.*
Poole.	*Lyme Regis.*	*Bridport.* *Charmouth.*
	Weymouth.	*Portland.* *Lulworth.*
Southampton.	— — —	*Swanidge.* *Wareham.*
	— — —	*Chriſtchurch.* *Hinington.*
	Cowes.	*Yarmouth.* *Newport.*
	Portſmouth.	*Emſworth.*
Chicheſter.	*Arundel.*	*Pagham Point.* *Selſey.*
	Shoreham.	*Brighthemſton.*
	Lewis.	*New Haven.* *Seaford.*
	Pemſey.	
	Haſtings.	
	Rye.	*Winchelſea.* *Lyd.* *Rumney.*
	Hyth.	*Sandwich.*

Ports.	Members.	Creeks.
Sandwich.	*Dover.*	
	— — —	*Rumſgate.*
		Marget.
		Whitſtable.
	Deal.	
	Feverſham.	
	Milton	
	Rocheſter.	*Quinborough.*

Note, All the Ports and Havens in *England* are *infra Corpus Comit.* and that the Court of Admiralty cannot hold Juriſdiction of any thing done in them. *Holland*'s Caſe, Earl of *Exeter*, 30 *H.* 6. And becauſe he held Plea in the Admiralty of a thing done *infra Portum de Hull*, Damages were recovered againſt him two thouſand Pounds. *Godbolt* 260, 261.

X. In regard that the Port of *London* is of great Concern in relation to the Cuſtoms, the Extent and Limits of the ſame Port is by the *Exchequer* ſettled, which is declared to extend and be accounted, from the Promontory or Point called *North-foreland* in the Iſle of *Thanet*, and from thence *Northward* in a ſuppoſed Line to the oppoſite *Promontory* or Point called the *Naſe*, beyond the *Gun-fleet* upon the Coaſt of *Eſſex*, and continued Weſtward through the River of *Thames*, and the ſeveral Channels, Streams and Rivers falling into it, to *London-bridge*, ſave the uſual and known Right, Liberty and Privilege to the Ports of *Sandwich* and *Ipſwich*, and either of them, and the known Members thereof, and of the Cuſtomers, Comptrollers, Searchers, and other Deputies, and within the ſaid Ports of *Sandwich* and *Ipſwich*, and the ſeveral Creeks, Harbours and Havens to them or either of them reſpectively belonging within the Counties of *Kent* or *Eſſex*.

Ad Portus inſtaurationem, quia publicæ utilitatis gratiâ fit, omnes ſubditi loci conferre operas debent, lib. 7. C. de oper. publ. Portus intuitu fluminis quo ambitur, & vectigalis quod ex navium ſtatione penditur, eſt publicus & hodie Regalibus accenſitur, § 2. Inſt. de rer. div. l. 4. §. D. eod. c. un. quæ ſunt Regal.

XI.

XI. And in regard, that when Ships did come up to the Port of *London*, there uſed to be very great Frauds committed by a promiſcuous kind of ſhipping and landing of Goods and Merchandizes at ſeveral blind or unknown Wharfs and Keys, by reaſon of which his Majeſty was often defeated of his Cuſtoms, it was provided that a Commiſſion might iſſue forth out of the *Exchequer* to aſcertain all ſuch Wharfs, Keys, or other Places, as his Majeſty, by virtue of ſuch Commiſſion, ſhould appoint, in purſuance of which his Majeſty hath been pleaſed to allow to be lawful Keys, Wharfs, and other Places, for the lading or landing of Goods.

Brewer's Key. *Cheſter's Key.* *Gally Key.* *Wool Dock.* * *Cuſtom-houſe Key.*	* The Stone Stairs on the Weſt-ſide thereof are declared not to be a Place for Shipping or Landing of Goods.
Porter's Key. *Bear Key.* † *Sabb's Dock.*	† Excluding the Stairs there, which are declared no lawful Place for Shipping or Landing of Goods and Merchandize.
Wiggon's Key. *Young's Key.* *Ralph's Key.* * *Dice Key.*	* The Stairs there declared unlawful for Shipping or Landing of Goods or Merchandize.
Smart's Key. † *Somer's Key.*	† The Stairs there declared no lawful Place for Shipping and landing of Goods and Merchandizes.
Lyon Key. *Butolph Wharf.* *Hamon's Key.* * *Gaunt's Key.*	* The Stairs on the Eaſt declared unlawful for Shipping or Landing of any Goods, *&c.*
Cock's Key.	One other Place betwixt *Cock's Key* and *Freſh Wharf*, called Part of *Freſh Wharf*, the Stairs are declared to be unlawful for Shipping or Landing of any Goods, *&c.*

Freſh

Freſh Wharf.

Billingſgate, — To be a common open Place for the landing or bringing in of Fiſh, Salt, Victuals, or Fuel of all ſorts, and all Native Materials for Building, and for Fruit (all manner of Grocery excepted,) and for carrying out of the ſame, and for no other Wares or Merchandize.

Bridge Houſe in Southwark. — Is only allowed for landing of any kind of Corn for the City of *London*, and not upon any private or particular Perſon's Account.

XII. It may be lawful for any Perſon to ſhip or lade into any Ship or Veſſel on the River of *Thames* bound over Seas, Horſes, Coals, Beer, ordinary Stones for Building: Fiſh taken by any of his Majeſty's Subjects, Corn or Grain, the Duties being paid, and Cocquets and other lawful Warrant duly paſſed for the ſame.

So likewiſe Deal-boards, Balks, and all ſorts of Maſts and Great Timber may be unſhipt and laid on Land at any place between *Limehouſe* and *Weſtminſter*, the Owner firſt paying or compounding for the Cuſtoms, and declaring at what Place they will land them before he unſhips them, and upon Licence had, and in the Preſence of an Officer they may unlade them; otherwiſe they incur a Forfeiture.

CHAP. XV.

Proviſions and Allowances made notwithſtanding the ſeveral Clauſes in the Acts for the Cuſtoms.

I. Cuſtom to be paid for no more than is landed; and when Bulk ſhall be broken.

II. Of Goods Imported and Exported, what of the Cuſtoms ſhall be repaid back, and by whom; and of the things requiſite in the ſame.

III. Of Agreement or Contracts made, or to be made for the importing and exporting by way of Compoſition, ratified.

IV. What Allowances to be made to the Exporters of Wines.

V. Of Exporting of Spaniſh Wool; where the ſame may be done.

VI. Of Currans Exported, what Allowances ſhall be made, and to whom, as well to Denizens as Foreigners.

VII. Goods imported not finding Market after a Year; Wine exported when diſcharged of Cuſtom.

VIII. What Allowances are to be made for Leakage.

IX. What ſhall be accounted Leakage.

X. Wines proving unmerchantable, what Allowances to be made.

XI. Tobacco's receiving Detriment or Damage in the Importation, what Allowances to be made.

XII. Strangers paying double Subſidy, where they ſhall pay double Cuſtom.

XIII. Of Times and Places lawful to unlade, and Officers Duties then attendant to be preſent.

XIV. York, Newcaſtle, and Hull Men were Cuſtom free, and for what Goods.

XV. Exeter and other Weſtern Men, what free Subſidies ſhall be allowed in.

XVI. Woollen, whether new or old, what Allowances ſhall be made in Cuſtom or Subſidy.

XVII. Allowances of five in the Hundred for all other Goods.

XVIII. The Cuſtomers and other Officers Duties in reference to attend their ſeveral Duties in the Cuſtoms.

XIX. Of Officers their Duties, and the Puniſhment where made on Complaint.

XX. The ſeveral Duties of London, how preſerved.

XXI. The like for other Cities for thoſe Duties granted or taken for publick good Uſes.

XXII. Where Ships may be viſited, and the Officers Duty relating to the ſame.

XXIII. Timber to be rated, and in what manner muſt pay.

XXIV. Prevention in Extortion of Cuſtomers and Officers, and on what Pains and Penalties.

XXV. Where Fees for Cocquets and Certificates ſhall be paid all together, and where he ſhall detain his own Cocquet till the Veſſel has broke Ground.

XXVI. Where the Officers and Cuſtomers ſhall allow and make good to the Merchants the Algier Duty and all other Allowances, and no other Impoſition or Duty required by the Book of Rates, ſhall be required to be paid.

XXVII. If Goods ſhall happen to be taken by Enemies or Pyrates, or wrecked, and what Allowances ſhall be paid.

XXVIII. Ships of War and other privileged Veſſels ſubject to ſearch.

XXIX. Of Allowances to be made, and of Shipping out leſſer Quantities than are contained in the Certificate, what Operation the ſame hath.

EVERY Merchant ſhall have free Liberty to break Bulk in any Port allowed by Law; and to pay Cuſtom and Subſidy for no more than he ſhall enter and land; provided that the Maſter or Purſer of every ſuch Ship ſhall firſt make Declaration upon Oath before any two principal Officers of the Port of the true Contents of his Ship's lading, and ſhall likewiſe after declare upon his Oath, before the *Cuſtomer*, *Collector*, *Comptroller*, *Surveyor*, or any two of them, at the next Port of this Kingdom, where his Ship ſhall arrive, the Quantity and Quality of the Goods landed at the other Port where Bulk was firſt broken, and to whom they did belong. *Vide Cap.* 14. What are lawful Places of landing.

A Merchant brought eighty Tun of Bay-Salt by Sea to a Port in *England*, and out of that Ship ſold twenty Tun, and diſcharged the ſame into another Ship then riding at the ſame *Port*, but the twenty Tun were never actually put on Shore, and for the reſt, being ſixty Tuns, the Maſter agreed for the *Cuſtoms* and put them on Land; and although that that twenty Tun was always water-born, and never were put on Shore, yet adjudged they ought to pay; the Reaſon was, for the diſcharging them out of the Ship amounts as much as to the laying them on Land, the ſame being done in Port; for otherwiſe the King would merely be defrauded. But if a Ship is carried in by Storm, and to preſerve the Veſſel part is landed before the Duty paid, yet this will not ſubject the ſame to a Forfeiture. *Cok.* 12. part *fol.* 17, 18. *Plowden* 9. *Fogaſſa*'s Caſe.

II. All Foreign Goods and Merchandizes (except Wines, Currans, and wrought Silks) firſt Imported, ſhall be again Exported by any *Engliſh* Merchant within twelve Months, and ſuch Merchant or Merchants as ſhall export any ſuch Foreign Goods or Merchandizes (except as before is excepted) ſhall have Allowance and be repaid by the Officer which received the ſame, the one Moiety of the Subſidy which was paid at the firſt Importation of ſuch *Goods* or Merchandizes, or any Part thereof, ſo as due Proof be firſt made by Certificate from the Officers of the due Entry and Payment of the Cuſtom and Subſidy of all ſuch Foreign Goods and Merchandizes inwards, with the Oath of the Merchants importing the ſame, affirming the Truth thereof, and the Name of his Majeſty's Searchers, or Under-ſearcher in the Port of *London*, and of the Searcher of any other the Out-

Ports, teſtifying the Shipping thereof to be exported; after all which duly performed in manner before expreſſed, the Moiety of the Subſidy firſt paid inwards, ſhall without any Delay or Reward be repaid unto ſuch Merchant or Merchants who do export ſuch Goods and Merchandizes, within one Month after Demand thereof, as alſo the whole additional Duty of *Silk*, *Linen*, and *Tobacco*, as before is directed.

Lutw. 215. 221. 14 *H.* 7.

If the Officer ſhall refuſe to pay, (admitting there was no Relief had by way of Complaint) whether the Merchant Exporter may not bring an Action againſt him upon the Debt created in Law, as he that hath a Tally may do *.

* *Hobart* 270. Rolls Abridg. 599.

III. And if there be any Agreement now in force, which was formerly made by the late Commiſſioners of the Cuſtoms and Subſidies, with the Merchants Strangers or their Factors, or ſhall hereafter be made by any Commiſſioners or Farmers of the Cuſtoms and Subſidies, or any other Power, (except by Conſent of Parliament) with any Merchant or Merchants Strangers or Factors for any Foreign Goods and Merchandizes, to be brought into the Port of *London*, or any other Port or Haven of this Kingdom of *England*, or Principality of *Wales*, and to be exported again by way of Compoſition; all other Merchants being his Majeſty's Subjects ſhall be admitted into the ſame Compoſition, and not be excluded from any other Privilege whatſoever granted to the Stranger by any private Agreement or Compoſition, under the ſame Condition and with the ſame Reſtriction as ſhall be made with the Merchant Stranger.

IV. Every Merchant, as well *Engliſh* as Strangers, that ſhall ſhip and export any kind of Wines, which formerly have paid all the Duties of Tunnage inwards, ſhall have paid and allowed unto them all the Duties of Tunnage paid inward, except to the *Engliſhmen* 20 *s.* *per* Tun, and the Stranger 25 *s.* *per* Tun; upon due Proof of the due Entry and Payment of Tunnage inwards, and of the Shipping thereof to be exported to be made as above.

12 *Car.* 2. *c.* 32. 14 *Car.* 2. *c.* 18.

V. If any Merchant, Denizen, or Stranger, ſhall export any *Spaniſh* or Foreign *Wool*, he ſhall have Liberty ſo to do, with this further Condition, that ſuch *Spaniſh* or other Foreign *Wools* whatſoever be not exported in any other Ship or Veſſel whatſoever, with intent to be arrived beyond the Seas out of the Kingdom of *England*, and Dominion of

Wales,

Wales, than only in *Engliſh* Shipping, upon Pain of Confiſcation.

VI. Every Merchant, as well *Engliſh* as Stranger, which ſhall ſhip or export any Currans which formerly were duly entered, and paid the Subſidy and Cuſtom inwards, ſhall have allowed and repaid unto them reſpectively all the Cuſtom and Subſidy paid inwards for the ſame, except 1 *s*. 6 *d*. for every hundred Weight to the *Engliſh*, and 1 *s*. 8 *d*. and One-halfpenny for every hundred Weight to the Stranger, upon due Proof of the due Entry, and Payment of the Cuſtom and Subſidy thereof inwards, and of the Shipping thereof to be exported to be made as in the ſecond Article.

VII. If any Merchant, having duly paid all Duties inwards for Foreign Goods, and in regard of bad Sale ſhall be enforced to keep the ſame, or any Part thereof in his Hands, after the Space of a Year ſhall be elapſed; in this caſe he or any other Perſon is to be permitted to ſhip the ſame out for Parts beyond the Seas, if they think fit, without Payment for any Subſidy for the ſame outwards, upon due Proof that the ſame was duly entered, and Subſidy paid inward.

VIII. Every Merchant bringing in any ſort of Wines into this Kingdom by way of Merchandize, and ſhall make due Entries of the ſame in the Cuſtom-houſe, ſhall be allowed 12 *per Cent*. for Leakage.

IX. Every Hogſhead of Wine which ſhall be run out, and not full ſeven Inches, ſhall be accounted for outs, and the Merchant to pay no Subſidy for the ſame.

And by ſome its conceived, that no Freight ſhall be paid for the ſame, but the Merchant may fling them up to the Maſter for Freight; but that ſhould ſeem hard, for *non conſtat* any Fault in the Maſter, but the ſame may be in the Caſks, or in the ill ſtowing (the Maſter by Cuſtom having no Charge of the Stowing of Wines, eſpecially *French*, but the ſame belongs to certain Officers beyond Seas, from whence they are imported) beſides the *Goods*, be they empty or full, take up Tunnage in his Ship; and ſhould all the Wines on Ship-board have the ſame Misfortune, it would ſeem hard; however, it is pity Opinion in this caſe ſhould amount to a laudable Cuſtom.

Boyce verſ. Cole ſen. & Cole jun. Hill. 27 Car. 2. in B. R.

X. If any Wines ſhall prove corrupt and unmerchantable, and fit for nothing but to diſtil into hot Waters, or to

make Vinegar, then every Owner of ſuch Wines ſhall be abated in the Subſidy, according to ſuch his Damages in thoſe Wines, by the Diſcretion of the Collectors of the Cuſtoms, and one of the principal Officers.

There is a Book at the *Cuſtom-houſe*, in which there is a general Value ſet on all Goods; among which Tobacco is there valued.

XI. If any *Tobacco* or other *Goods* or *Merchandize* brought into this Kingdom ſhall receive any Damage by ſalt Water or otherwiſe, ſo that the Owner thereof ſhall be prejudiced in the Sale of ſuch Goods, the principal Officers of the Cuſtom-houſe, or any two of them, whereof the Collector for the Time being to be one, ſhall have Power to chuſe two indifferent Merchants experienced in the Values of ſuch Goods, who upon viſiting of ſuch Goods, ſhall certify and declare upon their Corporal Oaths firſt adminiſtred by the ſaid Officers, what Damage ſuch Goods have received, and are leſſened in their true Value; and according to ſuch Damage in relation to the Rates ſet on them in the Book of Values, the Officers are to make a proportionable Abatement unto the Merchant or Owner of the Subſidy due for the ſame.

By an Act 12 *Anne c.* 8. §. 8. There is to be no Allowance for damaged Tobacco; but the Merchant refuſing to pay the Duties, ſuch Tobacco is to be burnt.

Nor can ſuch Merchants Strangers land their Goods before they have agreed for the Cuſtoms, notwithſtanding *Charta Mercatoria*.

XII. All Merchants Strangers, who, according to the Rates and Values ſet in the general Book of Values and Rates, and do pay double Subſidy for Lead, Tin, Woollen Cloth, ſhall alſo pay double Cuſtom for Native Manufactures of *Wool*; and the ſaid Strangers are to pay for all other Goods, as well inwards as outwards, rated to pay the Subſidy of Poundage, three Pence in the Pound, or any other Duty payable by *Charta Mercatoria*, beſides the Subſidy.

XIII. That the Merchants trading into the Port of *London*, have free Liberty to lade and unlade their Goods at any lawful Keys and Places of Shipping and lading Goods between the *Tower* of *London* and *London-Bridge*, and between Sun-riſing and Sun-ſetting from the Tenth Day of *September* to the Tenth Day of *March*; and between the Hour of Six of the Clock in the Morning, and Six of the Clock in the Evening, from the Tenth Day of *March* to the Tenth of *September*, giving Notice thereof to the reſpective Officers appointed to attend the lading and unlading of Goods; and ſuch Officer as ſhall refuſe upon due Calling to be preſent, he ſhall forfeit for every Default 5 *l.*

the

the one Moiety to the King, the other to the Party aggrieved, he ſuing for the ſame.

XIV. The Merchants of *York*, *Kingſton upon Hull*, and *Newcaſtle upon Tyne*, and the Members thereof, ſhall be allowed free of Cuſtom and Subſidy two of the Northern Cloths and Kerſies in ten to be ſhipped in thoſe Ports in the Name of *Double Wrappers*, as formerly has been there allowed them.

XV. The Merchants of *Exeter* and other Weſtern Parts ſhall be allowed free of Subſidies one *Perpetana* in Ten for a *Wrapper*, and three *Devons Dozens* in Twenty for *Wrappers*, the ſame to be ſhipped out of the Ports of *Exeter*, *Plymouth*, *Dartmouth*, *Barnſtable*, *Lyme Regis*, or the Members thereof.

XVI. All Merchants tranſporting any ſort of *Woollen*, whether new or old Drapery, as alſo all *Bayes* and *Cottons*, ſhall be allowed one in Ten for a Wrapper free of Cuſtom and Subſidy.

Note, That all theſe ſeveral Allowances are not by Act of *Parliament*, but purely his Majeſty's gracious and voluntary Gift and Benignity towards the encouraging the Merchants and Trade.

XVII. Every Merchant ſhall be allowed upon all other Goods and Merchandize appointed to pay to any the Subſidy of Poundage, according to the Rate in the Book of Values, to be imported five in the Hundred of all the ſaid Subſidies of Poundage ſo appointed to be paid.

XVIII. The Officers who ſit above in the Cuſtom-houſe of the Port of *London*, ſhall attend the Service of their ſeveral Places from Nine to Twelve in the Forenoon, and one Officer, or one able Clerk, ſhall attend with the Book in the Afternoon, during ſuch time as the Officers are appointed to wait at the Water-ſide, for the better deciding of all Controverſies that may happen concerning Merchants Warrants, all other the Officers of the Out-Ports ſhall attend every Day in the Cuſtom-houſe of every reſpective Port for Diſpatch of Merchants and Ships, between the Hours of Nine and Twelve; and Two and Four in the Afternoon.

XIX. Every Merchant making an Entry of Goods either inwards or outwards, ſhall be diſpatched in ſuch order as he cometh; and if any Officer or his Clerk, ſhall either for Favour or Reward put any Merchant or his Servant duly attending and making his Entries as aforeſaid, to draw any other Reward or Gratuity from him than is limited in the Act of *Tunnage* and *Poundage*, and the general Book of

Values, if the Maſter Officer be found faulty herein, he ſhall, upon Complaint to the chief Officers of the Cuſtom-houſe, be ſtrictly admoniſhed of his Duty; but if the Clerk be found faulty therein, he ſhall upon Complaint to the ſaid chief Officers be preſently diſcharged of his Service, and not permitted to ſit any more in the Cuſtom-houſe.

XX. The Lord Mayor, Commonalty, and Citizens of the City of *London*, their Officers, or Deputies for and touching Offices of *Package*, *Scavage*, *Baleage* or *Portage* of any Goods or Merchandize of Aliens, or their Sons born within this Kingdom or Unfreemen, imported or exported into or out of the City of *London*, or the Liberties or Ports thereof, unto or from the Parts beyond the Seas, for or concerning the receiving or taking of any Fee or Rates heretofore uſually taken, for or in reſpect of the ſaid Offices, or any of them, might and may receive and take the ſame, any thing in the Act of Tunnage and Poundage, or any other Act or Thing to the contrary notwithſtanding.

XXI. All ancient Duties heretofore lawfully taken by any City or Town Corporate, their Farmers, Deputies or Officers, under the Name of Town-Cuſtom, or the like, for the Maintenance of Bridges, Keys, Harbours, Wharfs, or the like, ſhall and may be received and enjoyed as formerly, any thing in the ſaid Act, or any other Act to the contrary in any wiſe *non obſtante*.

XXII. The Under-Searcher or other Officers of *Graveſend* have Power to viſit and ſearch any Ship outward bound, but ſhall not, without juſt and reaſonable Cauſe, detain any Ship under Colour of ſearching the Goods therein laden above three Tides after her Arrival at *Graveſend*, under Pain of Loſs of their Office, and rendering Damage to the Merchant and Owner of the Ship; and the Searcher or Officer of the Cuſtom-houſe in any of the Out-ports having Power to ſearch and viſit any Ship outward bound, ſhall not without juſt and reaſonable Cauſe detain ſuch Ship, under Colour of ſearching the Goods therein laden, above one Tide after the ſaid Ship is fully laden and ready to ſet ſail, under Pain of Loſs of the Office of ſuch Offender, and rendering Damage to the Merchant and Owner of the Ship.

XXIII. All Timber in Balks, which ſhall be of eight Inches ſquare and upwards, that ſhall be imported or brought from any Part beyond the Seas into the Realm of

England,

England, Dominion of *Wales*, Port and Town of *Berwick*, or any of them, ſhall be rated according to the Meaſure of Timber, the Foot ſquare 3*d*. for the Value thereof, and according to that Rate ſhall pay for Subſidy 12*d*. in the Pound according to Poundage; and all under eight Inches ſquare, and above five Inches ſquare, ſhall pay for Subſidy, according to the Rates mentioned in the Book of Rates for middle Balks, and all of five Inches ſquare or under ſhall pay according to the Rate of ſmall Balks.

XXIV. For avoiding of all Oppreſſions by any the Officers of the Cuſtoms in any Port of this Kingdom, in exacting unreaſonable Fees from the Merchant, by reaſon of any Entries or otherwiſe touching the ſhipping or unſhipping of any Goods, Wares or Merchandize, it is ordered that no Officer, Clerk, or other, belonging to any Cuſtom-houſe whatſoever, ſhall exact, require, or receive any other or greater Fees of any Merchant or other whatſoever, than ſuch as are or ſhall be eſtabliſhed by the Commons in Parliament aſſembled: and if any Officer or other offend contrary to this *Order*, he ſhall forfeit his Office and Place, and be for ever uncapable of any Office in the Cuſtom-houſe.

XXV. All Fees appointed to be paid unto the *Cuſtomer*, *Comptroller*, *Surveyor*, or *Surveyor General* in the Port of *London*, for any Cocquets or Certificate outwards, ſhall be paid altogether in one Sum, to that *Officer* from whom the Merchant is to have his Cocquet or Certificate above in the Cuſtom-houſe; and after the Merchant hath duly paid his Cuſtom and Subſidy, and other Duties above in the Cuſtom-houſe, as is appointed above by the Book of Rates, he is to be Maſter of and keep his own Cocquet or Certificate, until he ſhall ſhip out his Goods ſo entered, when as he is to deliver the ſame to the *Head Searcher*, or his Majeſty's *Under Searcher* in the Port of *London* or other *Ports*, together with the Mark and Number of his Goods.

XXVI. The *Officers* of the Cuſtom-houſe for the Time being, ſhall allow and make unto all Perſons all ſuch Monies as are or ſhall be due unto them for the half Subſidy, and alſo the *Algier* Duty of Foreign Goods formerly exported now due and unpaid.

The Duties and Sums of Money appointed to be paid by the Act of Tunnage and Poundage paſſed this Parliament, and

and by the Book of Rates therein mentioned, and no other, ſhall be paid to his Majeſty's *Officers* during the Continuance of the ſaid Act upon Goods imported and exported, any Law, Statute, or Uſage to the contrary notwithſtanding. Nevertheleſs the Duty of *Prizage* and *Butlerage*, and the Duty of 12 *d.* of every Chaldron of Sea-coal exported from *Newcaſtle upon Tyne* to any other Port or Ports of this Realm, ſhall be continued.

27 Ed. 3. cap. 13. 12 Car. 2. cap. 4. XXVII. If any Merchant Denizen born ſhall happen to have his Goods and Merchandize taken by Enemies or Pyrates at Sea, or periſhed in any Ship or Ships, the Duties being either paid or agreed for, upon due Proof thereof, may ſhip out of the ſame Port the like Quantity as ſhall amount unto the Cuſtom without paying of any thing for the ſame.

If the Importer ſhall pay ready Money, he ſhall be allowed 10 per Cent. *for ſo much as he ſhall pay down.*

14 Car. 2. c. 11. XXVIII. Ships of War may be entered and ſearched for prohibited and unaccuſtomed Goods, and to bring them aſhore to the King's Warehouſes, and the Commiſſioners or Head-Officers may leave aboard Officers to look after them, that none be unladen or embezzled, on Pain of Forfeiture of 100 *l.* And if Goods are concealed on Ship-board after ſuch time as the Ship is cleared, to forfeit 100 *l.* and then any with a Writ of Aſſiſtance out of the Court of *Excheqeer* to go in the Day-time to any Place, and enter and ſeize.

Goods conveyed ſecretly into Ships, and carried away without paying the Subſidy and Duties, the Owners and Proprietors forfeit the double Value, except Coals, which only forfeit the double Cuſtom and Duty.

XXIX. There are Allowances to be given Merchants for defective and damaged Goods of 5 *per Cent.* on all Goods imported, and 12 *per Cent.* on all Wines to be allowed upon Debentures; but if they ſhall ſhip out leſs than is in the Certificate, then the Goods therein mentioned, or the Value thereof, ſhall be forfeited, and the Owner or Merchant ſhall loſe the Benefit of receiving back any of the Subſidy: And Goods ſhipped out, are not to be landed again in *England*, on Pain of Forfeiture of thoſe Goods.

All Goods coming out of, or carried into *Scotland*, by Land, ſhall paſs through *Berwick* or *Carliſle*, and pay Cuſtom as others, on Pain of Forfeiture. And

And although that by this Act there are many Allowances to be made, eſpecially to Merchants Denizens, yet the Parliament have ever been ſo careful as to bound the ſame, that is, it ſhall be to ſuch who traffick in Ships; (which are indeed the Bulwark of this Iſle) and therefore if ſuch Merchandize ſhall be tranſported out in any Galley or Carack, they are obliged to pay all manner of Cuſtoms, and all manner of Subſidies, as any Alien; but in regard that Herring and Fiſh are, and have been accounted, one of the principal Commodities, and generally finds a Vent or Market in thoſe Kingdoms and Countries that uſually employ ſuch ſort of Veſſels, thoſe Commodities may be tranſported in them as well as Ships from any Port or Harbour within this Realm, without paying any Subſidy or Poundage for the ſame; but then ſuch Fiſh muſt be taken by the Natives of the Kingdom, and tranſported by them, otherwiſe to pay as Aliens.

And whereas all manner of *Woollen* Cloths, as well white as coloured, unrowed, unbarbed, and unſhorn, and not fully dreſſed, are prohibited by Law to be tranſported, His Majeſty was graciouſly pleaſed to grant * unto *Frances* Counteſs of *Portland*, as well for her Alliance in Blood, as alſo for the many Croſſes and Calamities which ſhe hath ſuffered by the Loſs and Death of her neareſt Relations in his Majeſty's and his Royal Father's Service, full Power for one and thirty Years, to licence the tranſporting of ſuch Goods *non obſtante* ſuch prohibitory Laws; the which is now put in Execution by Agreement, and the Compoſition with her Deputies at the Cuſtom-houſe.

* *Per* Letters Patents bearing Date 24th of *Feb.* 27 *Car.* 2.

CHAP.

CHAP. XVI.

Of the Right of Paſſage: Of impoſing on the Perſons and Goods of Strangers for Paſſage through the Seas.

I. *Of the Right of harmleſs* Utility *excepted tacitly in the primitive Dominion of Things.*
II. *Where Paſſage ought to be open, and where the ſame might be implicitly provided for in the firſt Inſtitution of Property, and under what Cautions.*
III. *Of the ſame Right in reference to Goods and Merchandize.*
IV. *If Paſſage admitted, whether* Tribute *or* Toll *may be impoſed.*
V. *Where Impoſition may lawfully be laid, and for what Cauſes; And of the King's Prerogative in that Point.*
VI. *Whether lawful to ſtay in others Country, and to build for a Seaſon.*

I. HAVING in the foregoing three Chapters obſerved ſomewhat of *Cuſtoms* and *Impoſitions* laid *de facto* within the Realm, and that by Acts of Parliament, or the Conſent of the three Eſtates, it may not ſeem amiſs to inquire what Impoſition the King of his Prerogative may impoſe on Strangers and their Goods paſſing through his Territories and Seas; and in that to inquire of the ſame in reference to Perſons and Goods.

Beſides the Right of Neceſſity which ſeems to be excepted in the firſt Inſtitution of Dominion, there is another Relique of old Communion, namely, the Right of harmleſs Utility: *For why ſhould not one* (ſaith *Cicero*) *when without his own Detriment he may, communicate to another in thoſe things that are profitable to the Receiver, and to the Giver not chargeable?* Therefore *Seneca* ſaith, *It cannot be called a Benefit to give leave to another to light his Fire by yours.* We read in *Plutarch*, it is not lawful to ſpoil our Victuals when we have more than enough, nor to ſtop, nor hide a Fountain, when we have drunk our Fill; nor to aboliſh the Way-marks either by Sea or Land, which have been uſeful to us: So a River as a River is proper to that *Prince*, or that *Lord*, or that *People*, within whoſe Dominion or Royalty it runs, and they may make a Mill on it, (unleſs it be common, as a High-way) and may take what Fiſh the River

Cic. de Offic. 1.

Sen. de Benef. 4. Sympſ. 7.

Leg. quædam D. de rer. diviſ.

River yields, but the ſame River as a running Water remained common as to drinking or drawing of it, notwithſtanding as to the Fiſhing, and the like, it may be peculiar.

II. Again, Lands, Rivers, nay, if any part of the Sea be come into the Dominion or Property of any People, it ought to be open to thoſe that have need of Paſſage for juſt Cauſes, namely, being expelled by Force out of their own Country they ſeek void Places, or becauſe they deſire Commerce with remote Nations: The Reaſon here is the ſame which hath been mentioned * elſewhere, becauſe Dominion might be introduced with a Reception of ſuch Uſe † which profits theſe, and hurts not thoſe; and therefore the Authors of Dominion are to be ſuppoſed willing rather to have it ſo, than that ſuch a Reſtriction, which perhaps in the end may deſtroy Society: However this hath its *quantum*; for though harmleſs Paſſage may be excepted in the firſt Inſtitution of Dominion, yet that is to be underſtood when Leave is granted: And though Fear of the Multitude, which is to paſs, cannot take away that Prince his Right through whoſe Territories or Seas they go; yet it follows as naturally, that in the Inſtitution of ſuch Liberty that Prince or People may provide, and if they have any probable or any reaſonable Cauſe, interdict the Paſſage till Security or Hoſtages are pledged for their peaceable Paſſage, nay, without declaring their Reaſon, may interdict them abſolutely any manner of Paſſage, if there be any other way to paſs in Safety; and therefore at this Day, by the Laws of *England* *, the King may interdict any Nation or People whatſoever to paſs through his Seas without Leave firſt obtained to that Purpoſe, and may viſit all Ships, be they of War or Traffick that ſhall occur or be in the ſame.

Bald. 3. *conſ.* 293.

* *Lib* 1. *c.* 1. §. 3, & 4.

† *Serv. ad* 7. *Æn. littuſq; rogamus innocuum, cujus vindicatio, ait. nulli poſſit nocere.*

Plutarch relates, that *Cymon* going to aid the *Lacedemonians*, led his Army thorough *Corinth*, but being reprehended by the *Corinthians* for not aſking Leave of the City: *Nam & qui fores alienas pulſat, non intrat niſi domini permiſſu: at vos*, inquit, *Clioneorum & Magarenſium fores non pulſaſtis ſed perfregiſtis conſentes omnia patere debere plus valentibus.* However, Paſſage is and muſt be requeſted; but in lieu of that, the ſtriking of the Flag, and lowering the Top-ſail, is in Token of that Right due to his Majeſty in the *Britiſh* Seas. * *Vide lib.* 1. *cap.* 4. and Selden's *Mare Clauſum.*

III. Nor is Paſſage only due to Perſons, but to Merchandize alſo; for no Man hath Right † wilfully to obſtruct the way of Commerce to any Nation with any other that is remote, becauſe the Permiſſion of Trade is for the Intereſt of human Society, and is not diſcommodious to any one, and to that Purpoſe *Philo* ſpeaks: *On the Sea all Ships of Burden*

† That is, by the Laws of Nature, but the Laws of Nations and thoſe of Countries may.

In Legat. Caium.

Burden ſafely paſs according to that Right of Commerce which is between all Nations ariſing from the Deſire of natural Society, while they ſupply one another mutually with what the one wanteth, and the other can ſpare; for Envy hath never invaded either the whole World, or the greater Parts thereof. And *Plutarch* ſpeaking thus of the Sea: *This Element hath made our Life ſociable and perfect, that otherwiſe would be wild and without Correſpondence; it ſupplies our Wants with mutual Aids, and by Exchange of Things needful, it procures Fellowſhip and Friendſhip.* And the Wiſdom of God is highly to be admired, who hath not granted all things to every Land, but hath diſtributed his Gifts to ſeveral Countries, that Men having need of one another, might maintain Society for their common good; therefore hath he endowed Man with Knowledge and Underſtanding to invent and build Ships, to govern and guide them by thoſe Lamps of Heaven, and other Inſtruments of his Divine Wiſdom, enabling thereby the Merchant to convey to all what any Place affords: According to that of the Poet,

> *What Nature any Land denied,*
> *By Navigation is ſupplied.*

Quomodo autem ſatis digne quis explicet facilitatem ad mutua Commercia nobis datam? Ne enim itineris longitudo impedimentum aliorum ad alios commeantibus adferret breviorem viam, maris ſcilicet, ubiq; terrarum diſpoſuit Deus, ad mundum tanquam domum communiter inhabitantes crebro invicem inviſerimus; & apud ſe nata quiſque alteri communicans viciſſim, commode acciperet res apud illum abundantes; ac ſic exiguam tenens terræ partem, ita tanquam ſi teneret univerſam, frueretur eis quæ orbis ſunt bonis. Licet itaq tunc tanquam in communi menſa convivarum unicuiq; ea quæ ſibi oppoſita dare alteri longius accumbenti, ac contra quæ apud ipſum ſunt accipere manu tantum extenta.

But as the Sea is free and open for Traders, yet nevertheleſs the Paſſengers are ſubject to ſuch Reſtrictions, Laws and Ordinances, as thoſe Sovereign Princes ſhall make of Force in thoſe Places where they have an Acceſſion of Property or Sovereignty.

IV. But admitting that ſuch free Paſſage may be granted, as above, whether Tribute may be impoſed by him that rules the Land, upon Merchandize paſſing by Land or by River, or by part of the Sea, which may be called an Acceſſion of the Land, (that is, the Place through which they paſs, is as much under the abſolute Juriſdiction of the Prince, as the very Land itſelf:) certainly whatſoever Burdens have no Relation to the Merchandize, no Equity ſuffers the ſame to be impoſed on the ſame; neither can Poll-

Vide Strabo. lib. 8. & lib. 16.

Money

Money put on the Inhabitants to ſuſtain the Charge of the Commonwealth, be exacted of Paſſengers.

V. Nevertheleſs, if either to ſecure the Paſſengers Goods and Veſſels from Pyrates and others, or for the erecting of Beacons, Light-houſes, and other Sea-marks, and ſuch like, * there indeed ſome Compenſation may be laid upon the Commodities or Ships paſſing through, ſo that the Meaſure of the Cauſe be not exceeded; or as my Lord *Coke* obſerves in the Caſe of the Halage-money, † it be reaſonable; for upon that depends the Juſtneſs of Tributes and Toll: And upon thoſe Reaſons the *Venetian* in the *Adriatick*, the King of *Denmark* in the *Baltick* Sea does demand the ſame; and the King of *England* may do the like in the *Chambers* of his Empire, and that by his Prerogative; for the ſame is not ſo much *compulſory* to any to pay, but to them that will take *Benefit* of ſuch Accommodation.

* 13 *H.* 4. *fol.* 14.

† *Lib.* 5. *fol.* 63. Caſe of the Chamberlain of *London*.

Vide the Plea of the *Venetian* Lawyers at the End of Mr. *Selden's* *Mare Clauſum*

Les Comons praiont que lou le Roy ſes Progenitors de long temps haut eſtre Seigneur de Mer, & ore eſt venus que le Roy Seigneur des Coſts de ambideux partes del Mer, & par ceo praiont le Roy de impoſer un impoſition ſur Eſtrangers paſſant purmy la Mer.

Strabo relates, that the *Corinthians*, even from the moſt ancient of Times, received Tribute of the Commodities, which to avoid the compaſſing of *Malta*, were carried by Land from Sea to Sea. So the *Romans* received a Price for the Paſſage of the *Rhyne*. But this Right of impoſing on Ships and Goods paſſing through ſome Territories, is found cruel, eſpecially when they muſt paſs through the Territories of a powerful and fierce People, then it is heavy to the Merchant to compound, for it's often done on hard and grievous Terms.

Pereg. lib. 1. *de Jure Fiſci*, c. 1. *num.* 27.

VI. Again, to ſtay ſome time for Health Sake, or for any other juſt Cauſe, ought alſo to be permitted to Paſſengers, for this too is among the innoxious Utility; wherefore *Illoneus* in *Virgil*, * when the *Trojans* were prohibited to ſtay on the Shore of *Africk*, is bold to invoke the Gods as Judges: And the Complaint of the *Megarenſes* againſt the *Athenians*, who drove them from their Havens † *againſt common Right*, was approved by the *Greeks*, ſo that the *Lacedæmonians* eſteemed no Cauſe to create a War more juſt:

* *Servius ad eum loc.*

† *Plutarch Pericle.*

juſt: Hence it is, that at this Day it is held by all Lawyers, that it is lawful (either in caſes of Wreck, or any other Exigency upon ſuch landing) for Paſſengers to build a Cottage or Hut on the Shore to ſhelter them for a Seaſon, though we grant the Shore to be poſſeſſed by the Inhabitants: 'Tis true, *Pomponius* does think there ought to be the Prætor's Decree; but certainly that extends only to thoſe Paſſengers, that, being expulſed their own Countries, deſire perpetual Habitation, and a Subjection to the Government of the Place where they deſire to dwell.

Occupantis enim eſt poſſeſſio littoris unde oſtenduntur crudeles qui etiam a communibus prohibeant.

The End of the Second Book.

BOOK

BOOK III.

CHAP. I.

Of Freedom, Bondage, Slavery, Exile, and Abjuration.

I. *Of Freedom by the Law of Nature, and of Bondage, Slavery, or Captivity introduced by the Law of Nations.*
II. *Of the Actions that ſubject Man to Bondage.*
III. *Of the Dominion over Slaves, Bond-men and Captives.*
IV. *Of the Cauſe, or Reaſon of ſuch Dominion.*
V. *That this Right or Dominion was not a Law univerſal.*
VI. *Of Bondage or Slavery, where diſcontinued by the Chriſtians and Mahometans.*
VII. *Of a Servitude at this Day, ſtanding with the Laws of a Chriſtian Commonwealth.*
VIII. *Of Manumiſſion and Freedom by the* Hebrew *and* Roman *Law, and by the Laws of* England.
IX. *Of disfranchiſing, the ſeveral ways.*
X. *Of Abjuration and Exile; and what Operation it hath.*
XI. *Of Freedom in Cities and Corporations, in reference to Merchants, Traders and Foreigners.*

I. IN the primitive State of *Nature*, no Men were Servants; yet it is not repugnant to natural Juſtice, that by the Fact of Man, that is, by *Covenant* or *Tranſgreſſion*, Servitude ſhould come in; therefore Servitude is brought in by the *Laws of Nations*.

L. libert, §. 1. D. de ſtatu hominum. Fiunt etiam ſervi liberi homines captivitate de jure gentium. Bracton, *l.* 1. *c.* 6.

II. Hence it is, that thoſe that will yield up their Perſons, or *promiſe* Servitude, are accounted *Slaves*; ſo likewiſe all that are *taken in Publick War*, and brought within the Guards of their Conquerors; nor is Tranſgreſſion neceſſary, but the Lot of all is equal after the War is begun, even thoſe, whoſe ill Fortune ſubjected them to be deprehended within the Enemies Bounds; nor are they Servants only themſelves, but all their Poſterity for ever.

Littleton §. 175. *l. Poſtlim.* §. 1. *D. de Captiv.*

L & ſervorum §. 1. D. de ſtatu hominum. Apud omnes peræq; gentes, ait Caius, *animadvertere poſſumus dominis in ſervos vitæ neciſq; poteſtatem fuiſſe. Co. Inſtit. fol. 116. b. l. 1. D. de his qui ſui ſunt juris.*

III. The Privileges of this *Right* or *Dominion* are infinite; *ſince there is no Suffering which may not be impoſed on ſuch, nor Work which may not every way be extorted from them*: So that even the Cruelty of Maſters became almoſt unpuniſhed, till the Municipal Laws of Countries ſet Bounds to their Rigour and Power.

Nor are the Perſons become theirs only that have the Power of them, but alſo all that they have; for ſuch unhappy Perſons *can have nothing of their own.*

Leg. Cornel ff. de Teſtam. & Leg. Cornel. ff. de vulg. ſubſtit.

Hence it was, that that excellent Law in favour of ſuch, was introduced by the *Romans*, called *Lex Cornelia*, which was, when a Captive, *intra præſidia hoſtium*, died in his Captivity; if he had made a Will, before his being taken Captive, yet ſuch a Captive ſhould in favour of ſuch Will, and for the upholding of the ſame, be feigned to be dead, and *in puncto temporis*, immediately before ſuch his being taken Captive; and ſo by that Legal Fiction of Death, his Will became firm and valid as if he had really died without ever being taken by the Enemy. So likewiſe if one had been made a Slave, yet if he had returned out of his Captivity, that for the Preſervation of his Right and Propriety, he was feigned as if he had never been abſent, and was immediately redintegrated into his priſtine State and Condition.

In jure Poſtliminii leg. retor. & l. in bello §. 1. & l. bon. ff. d. Capt, & § 4. D. quibus mod. jus patr. ſolvit.

And *Forteſcue* conceives, it began *ab homine, & pro vita introducta eſt ſervitus, E. ſed libertas à Deo homines indita naturæ, quare ipſa ab homine ſublata ſemper redire gliſcit, ut faciut omne quo libertate naturali privatur, cap. 42.*

IV. Now all theſe Privileges and Immunities were introduced by the *Laws of Nations*, for no other Reaſon, but that their Captors, tempted by ſo many Immunities, *might willingly abſtain from that cruel Rigour of ſlaying their Priſoner.*

Hence it is, that the Captor's Dominion is extended to the Children; for ſhould ſuch *uſe their higheſt Right, they would not be born*; but Children that are born before that Calamity, and were never taken Priſoners, are freed from that unhappy State.

V. Though this Dominion or Right was generally acquired in moſt Nations, yet was not the ſame an *univerſal Law*; for amongſt the *Jews*, Refuge was granted to Ser-

vants

vants who fell into that Calamity by no Fault of their own. And the State of *Chriſtendom* at this Day is apparent, That Priſoners taken in War do not become perfect Slaves, as of old, but only remain in the Cuſtody of the Captor, till *Ranſoms are paid*, whoſe Valuations are generally at the *Pleaſure* of the Conqueror; yet Perſons of eminent Quality, as *Generals*, and the like, ſuch Perſons, * if taken by a common Soldier, yet he has no Advantage by the ſame; for ſuch a Captive is become Priſoner immediately to that Prince or State under whom the Captor ſerved: But if it be the Lot of an *inferior Soldier* to become a Priſoner of War, he is then become abſolutely the Captors to diſpoſe of; but he wanting thoſe Neceſſaries in the Field for himſelf, which he ought to provide for his Priſoner, commonly waves that Intereſt, and generally yields him up as a Priſoner of War to be diſpoſed of by that Prince or State under whom he ſerves.

* Article of War, *Anno* 1673. for his Majeſty's Forces, *Artic.* 24.

Bart. in l. nam. & *ſerv. D. de rebus geſtis.*

VI. Slavery in *Chriſtendom* is now become obſolete; and in theſe latter Ages the Minds of Princes and States having as it were univerſally agreed to eſteem the Words, *Slaves*, *Bondman*, or *Villain*, barbarous, and not to be uſed; and that ſuch as are taken in War between Chriſtian Princes, ſhould not become Servants, *nor be ſold, or forced to work, or otherwiſe ſubjected to ſuch ſervile Things*, but remain till an Exchange of Priſoners happen, or a Ranſom paid, as afore: Nay, the very *Turks* and *Mahometans* at this Day generally obſerve this among themſelves, not to make Slaves of thoſe of the *Mahometan Religion*, though taken in War; and that which is moſt to be admired, a Chriſtian fallen into that miſerable State, renouncing his Religion, and becoming a *Mahometan*, immediately upon his Circumciſion obtains his Freedom with a Recompence. The Cruelty of thoſe Infidels to thoſe unhappy Perſons, together with the Reward of renouncing, hath given Cauſe to many a brave Perſon to become *Renegado*; the which being conſidered by the Parliament of *England*, they made a † Proviſion for ſuch miſerable Perſons as ſhould be taken by *Turkiſh* and *Mooriſh Pyrates*.

In the Wars of the *French* with the *Spaniards* in *Italy*, a Horſeman was ranſomed for the 4th of his yearly Pay. *Vide Mariana l.* 27. *c.* 18. And in the laſt *Belgick* War, the *Engliſh* diſmiſt all the *Flemings* that were taken in War, as they did the like with thoſe of *England*. *Anno* 1671-2. *Quam non ſit ardua virtus ſervitium fugiſſe manu*, it is none of the hardeſt Virtues to embrace Death to avoid Slavery.

† 16 *Car.* 1. *cap.* 24. it's expired. Mr. *Thomas Betton*, a *Turkey* Merchant, left a very conſiderable Sum of Money to the Ironmongers Company, to be laid out in the Purchaſe of an Eſtate, the Produce of which is appropriated to the Redemption of *Britiſh* Slaves.

Salk. 666, 667.

VII. Though *Slavery* and *Bondage* are now become diſcontinued in moſt Parts of *Chriſtendom*, and to that Degree, that for the Perſon of a Man, be he *Moor* or other *Indian*, a Trover is not maintainable by the Laws of *England*; yet there may be a Servitude which may amount to a Labour or Suffering *equal* to that of Captives; the which may be juſtifiable; for Men, either through Poverty, and the like, may oblige themſelves by Contract for Maintenance to a Servitude that's perpetual, *i.e.* for Life, and ſo for Years; but at this Day there is no Contract of the Anceſtor can oblige his Poſterity to an hereditary Service; nor can ſuch as accept thoſe Servants, exerciſe the ancient Right or Dominion over them, no nor ſo much as to uſe an extraordinary Rigour, without ſubjecting themſelves to the Law. If an Eye or a Tooth had been ſtruck out injuriouſly, by the *Hebrew* Law Freedom was immediately due; and by the *Greeks*, if Servants had been ill treated, it was lawful for them to demand *a Sale of themſelves to others*. At *Rome* the Statues became Sanctuaries for Servants to implore the Help of the Governors againſt Rigour, Hunger, or any other intolerable Injury inflicted by their Maſters; and even in *London* at this Day in *Servitude*, (amongſt the many Cauſes, as not Inrollment of the Indentures, not inſtructing in the Art, Want of Neceſſaries, *infra ætatem* 14, &c.) Cruelty, Hunger, Rigour, immoderate Correction, and the like, are Cauſes ſufficient, on a *Monſtrance* or Petition to the Chamberlain, to diſſolve the Contract, though under Hand and Seal, and to decree all or part of the Dowry, or Sum given (if any) to the Servant; and if Cruelty hath been in the Caſe, to expoſe the Maſter to anſwer Damage to the Servant.

The *Engliſh* Merchants and others, for the *Virginia* and other Plantations, do hire Servants for a Term of Years.

Exod. 21. 26. 27.

Vide the Statute of 5 *Eliz.* c. 4. which hath provided the like Remedy in other Places.

VIII. *Ulpianus* obſerves, after that by the Laws of Nations Servitude came in, then followed the Benefit of Manumiſſion. By the *Hebrew Law*, after the Expiration of the Time agreed on, the Servant was to be manumitted, and that not without Gifts, like *London*'s Freedom; by the Cuſtom of which the Maſter is always at the Charge of Cloathing, and diſcharging the Chamberlain's Fees. By the *Roman Law*, every Son was in ſuch Subjection to his Father, that before he could be releaſed of this Subjection, and made free, he ſhould by an imaginary Sale be ſold three times by his natural Father to another Man, who was called by

by the Lawyers *Pater Fiduciarius*, that is, a Father in Truſt, and then be bought again by his natural Father, and ſo manumitted by him, and then he became free: This Form of ſetting free was by them called *Emancipatio*, Freedom.

Deut. 15. 13.

The *Ruſſians* having ſeized on the Country of *Illyria*, and made it their own by Conqueſt, their Victory pleaſed them ſo highly, that thereupon they called themſelves by a new Name, *Slaves*, which is in their Language, *Glorious*; but in after time, (that warmer Climate having thawed their Northern Hardineſs, and not ripened their Wits) when they were conquered, and made Servants to their Neighbours, the *Italians*, which kept many of them in Bondage, began to call all their Bond-men Slaves. Sir *Walter Ralegh*, Vol. I. p. 282. Edit. 1736.

That *Roman Darling* was to be obtained three Ways: 1. By Birth; * both, or at leaſt one of their Parents being free, and ſuch were called *Cives Originarii*.

Vide leg. 12. *Tabul. Sigenius de jure Roman.*

2. By *Gift* and *Cooptation*; when the Freedom was beſtowed on any Stranger or Nation, and then they were termed *Civitati Donati*: And ſo we read that *Cæſar* took in whole Nations into the Freedom.

* *Juſtin. Inſtit. lib.* 1. *tit. de Ingeniis. v. Franc. Silo in Catilin. art.* 4.

Laſtly, by *Manumiſſion*; which was thus: When as the Servant was preſented by his Maſter before the *Conſul* or *Prætor*, the Maſter laying his Hand upon his Servant's Head, uſed this Form of Words, *Hunc liberum eſſe volo*; and with that turning his Servant round, and giving him a Cuff on the Ear, he did *emittere ſervum è manu*: The *Prætor* laying then a certain Wand or Rod, called *Vindicta*, upon the Servant's Head, replied in this manner, *Dico eum liberum eſſe more Quiritum*; then the *Lictor* or *Serjeant* taking the Wand, did ſtrike the Servant on the Head, and with his Hand ſtruck him on the Face, and gave him a Puſh on the Back; and after this he was regiſtered for a *Freeman*. This being performed, the Servant having his Head ſhaven purpoſely at that time, received a Cap as a Token of Liberty.

Goodwyn *Antiq. Rom.* 4. 33, 34.

Tertullian obſerves, that at this Time of their Manumiſſion, the Servants received from their Maſters a white Garment, a Gold Ring, and a new Name added to their former.

Tertullian. de reſur. Carn.

By the *Laws* of *England*, every Subject born within the King's Dominions, is a *Freeman* of this Realm, as appears by the *Grand Charter*, *cap.* 14. yea, though he be a *Bondſlave* to a Subject: † But a *Stranger* born is no *Freeman*, till the King have made him a *Denizen*, in whoſe Power alone,

Magna Charta, cap. 14.

† As to ſome things, *vide poſtea*, §. 9.

alone, without the Help of any other, one may be made free.

To be a Freeman of the Realm, the Place of *Birth*, is held more conſiderable than the Quality of the *Perſon*; yet by the Opinion of *Huſſey* Chief Juſtice, and in *Calvin*'s Caſe of the *Poſt-Nati*, it is held for Law, that if *Ambaſſadors* of this Realm have Children born in *France*, or elſewhere, the Father and Mother being natural born Subjects, the Children are free of the Realm of *England*: But if either the Father or Mother of ſuch Children were an *Alien*, then are not thoſe Children free.

1 *Rich.* 3. *fol.* 4.

But the Law is conceived to be otherwiſe at this Day. The Statute *de Natis ultra mare*, 25 *E.* 3. declares the Iſſue born of an *Engliſh* Man upon an *Engliſh* Woman, ſhall be a *Denizen*; for upon the Conſtruction of this Statute it has been adjudged more than once, that if an *Engliſh* Man marry a *Foreigner*, and has Iſſue by her born beyond Seas, the Iſſue is a *Natural born Subject*.

Bacon's Caſe, *Croke* Charles 601. *Jenkin*'s *Cent.* 1, 2, 3.

Iſſue born beyond Sea.

If Baron and Feme *Engliſh* go beyond Sea without Licence, or tarry there after the Time limited by the Licence, and have Iſſue, that the Iſſue is an *Alien*, and not inheritable, contrary to the Opinion of *Huſſey*, 1 *R.* 3. 4. *Hide* againſt *Hill. Cro. Eliz.* 3. *Cro. Charles* 602. *Steven*'s Caſe, cited in *Bacon*'s Caſe.

Engliſh Merchant marries an *Alien*, and has Iſſue, he is not an *Alien*.

Curiam.

An *Engliſh* Merchant had Iſſue by a *Poliſh* Woman in *Poland*, and deviſes his Copyhold Land to the Uſe of his Children, *per Crook*, the Children are not Aliens. 1. Becauſe the Father went with Licence, being a Merchant. 2. In our Law, *Partus non ſequitur Ventrem*. 3. Blood is between him and his Iſſue. Several of the Judges held, that the Words in the *Stat.* 25 *Ed.* 3. *cap. De natis ultra mare*, whoſe Fathers or Mothers be or ſhall be of the Allegiance of our King, ſhall be taken diſtributive, Father or Mother, and not copulative, *Littleton*'s *Rep.* 23, 26, 27.

IX. *Disfranchiſing* by the *Romans*, called *Capitis diminutio*, was three-fold, *Maxima*, *Media*, and *Minima*; the leaſt Degree was, when the *Cenſors* pulled a Man from a higher Tribe down to a lower, and leſs honourable; or when by any *Cenſure* they diſabled a Man from ſuffraging or giving his Voice in the publick Aſſemblies; ſuch as were thus in the laſt manner puniſhed, were termed *Ærarii*, and *in ærarios veluti, quia omnia alia jura Civium Romanorum*

præterquam

prælerquam tributi & æris conferendi amiſerunt. Gellius relates, that *P. Scipio Naſica* and *M. Pompilius*, being *Cenſors*, taking a View of the *Roman* Knights, obſerved one of them to be mounted on a lean ſtarvling Horſe, himſelf being exceeding fat; whereupon they demanded the Reaſon, why his Horſe was ſo lean, himſelf being ſo fat? His Anſwer was, *Quoniam ego, inquit, me curo; equum vero ſervus.*

A. Gellius Noct. Attic. l. 3. c. 17.

By the ancient Laws of *England*, and by the *Great Charter*, no *Freeman* ſhall be taken or impriſoned, but by the lawful Judgment of his Peers (that is, by Jury, Peers for Peers, ordinary Juries for others who are their Peers) or by the Law of the Land; which is always underſtood by due Proceſs of the Law, and not the Law of the Land generally; for otherwiſe that would comprehend Bond-men, (whom we call Villains) who are excluded by the Word *Liber*; for ſuch Bond-man might be impriſoned at the Pleaſure of his Lord, but a Free-man neither could nor can, without a juſt Cauſe; nor does the Privilege extend to private Actions, or Suits between Subject and Subject, but even between the Sovereign and the Subject. Hence it is, that if a Peer of the Realm be arraigned at the Suit of the King for a Murder, he ſhall be tried by his * Peers, that is, by the Nobles. But if he be appealed of Murder upon the Proſecution of a Subject, his Tryal ſhall be by an ordinary Jury of twelve Freeholders: And as the *Grand Charter* did, and does protect the Perſons of Freemen, ſo likewiſe their Freehold; for by the ſame *Charter* it is declared, that the King, or his Miniſters, ſhall out no Man of his Free-hold without reaſonable Judgment; and ſo it was ruled upon a Petition in Parliament, ſetting forth, that a Writ under the Privy Seal, went to the Guardian of the Great Seal, to cauſe Lands to be ſeized into the King's Hands, and that thereupon a Writ iſſued forth to the Eſcheater to ſeize, againſt the Form of the *Great Charter*; upon Debate of which, the Party had Judgment to be reſtored: The greateſt and moſt explanatory Act, which ſucceeded in Point of Confirmation, was that of *Edward* the Third; the Words are, **That no Man, of what Eſtate or Condition ſoever he be, ſhall be put out of the Lands and Tenements, nor taken or impriſoned, nor diſinherited,**

First granted 17 *Joh. Reg.* revived 9 *H.* 3. and ſince confirmed above thirty times.

* The Lord *Morly* and *Monteagle*'s Caſe for the ſuppoſed Murder of one *Haſtings*, 15 *Car.* 2.

10 *E.* 4. 6.
33 *Hen.* 8.
Bro. Title, Tryals.

8 *Ed.* 3. *Rot. Parl. m.* 7.

28 *E.* 3. *c.* 3.

noꝛ put to Death, without he be bꝛought to anſwer by due Pꝛoceſs of the Law, that is, by the Common Law.

2. *Diminutio media*, was an Exilement out of the City, without the Loſs of ones Freedom; the Words of the Judgment or Sentence were, *Tibi aquæ & igni interdico.*

3. *Diminutio maxima*, was the Loſs both of the City and the Freedom, and by his Judgment or Sentence was obliged and limited to one peculiar Country, all other Places in general being forbidden him.

There was a fourth kind of Baniſhment, disfranchiſing, called *Relegatio*; which was the Exilement only for a Seaſon, as that of *Ovid*'s.

Ovid. de Triſt. lib. 2.

Adde quod edictum quamvis immite minaxque,
Attamen in pœnæ nomine lene fuit:
Quippe relegatus, non exul dicor in illo.

The Laws of *England* in this Matter have ſome Reſemblance with thoſe of the *Romans*; for *Bracton* obſerves four Diſtinctions:

In *London* the ſame is done by exhibiting an Information in the Name of the Common Serjeant, in the Mayor's Court there againſt any Citizen that ſhall juſtly deſerve ſo great a Diſhonour.

1. *Specialis, hoc eſt, interdictio talis Provinciæ, Civitatis, Burgi aut Villæ.*

2. *Generalis, Interdictio totius* Regni, *& aliquando eſt.*

3. *Temporaria, pro* duobus, tribus, quatuor, *aut* pluribus annis, *aut*, &c.———

4. *Perpetua, pro* termino vitæ, *& exilium eſt aliquando ex arbitrio Principis, ſicut in exiliando Duces* Hertfordiæ *&* Norfolciæ, *per Regem* Richardum *Secundum, & aliquando per Judicium Terræ, ut ſit in caſu* Piers *de* Gaveſton, *& etiam in caſu* Hugonis *de le* Spencer *Junioris, qui ambo fuerunt exilit' per Judicium in* Parliamento. So likewiſe was that of the Baniſhment of the Earl of *Clarendon*, who died beyond Sea *.

* 19 *Car.* 2. *c.* 10.

X. *Abjuration* was alſo a legal Exile, by the Judgment of *the Common Law*, as alſo by the Statute Law; and in the Statute of *Weſtm. the ſecond, cap.* 35. he that raviſhes a Ward, and cannot render the Ward unmarried, or the

Mr. *Selden* obſerves, that in the Time of K. *Hen.* the Firſt, and of other Kings, both before and after him, that if any Man, accuſed of a Capital Crime done at Sea, being publickly called five times by the Voice of the Cryer, after ſo many ſeveral Days aſſigned did not make his Appearance in the Court of Admiralty, he was baniſhed out of *England*; *& de mere appurtenant au Roy d' Angleterre*, for forty Years more or leſs, according to his Offence. *Mar. Clauſ. fol.* 12.

Value

Value of his Marriage, muſt abjure the Realm; and this is a *general* Exile. And by the Statute made 31 *Ed.* 1. Butchers are to be abjured the Town, if they offend the fourth Time, in ſelling meazled Fleſh; and this is a *ſpecial* Baniſhment.

A Man exiled does forfeit theſe things.

1. He loſeth thereby the Freedom and Liberty of the *Nation* out of which he is exiled.

2. He forfeits his Freedom in the *Borough* or *City* where he was free; for he which forfeits the Freedom of the whole Realm, forfeits his Freedom in every Part.

3. The Law accounts him as one *dead*; for his Heir may enter, and ſo may his Wife enter into her own Lands, and may ſue an Action as a *Feme ſole*. 34 *E.* 1. 1 *H.* 4. 3 *Bulſt.* 188. 1 *Inſt.* 132, 133.

4. He ſhall forfeit thoſe Lands which he ſhall purchaſe in the Realm, *during his Baniſhment*; for he, during his Baniſhment, is as much diſabled to purchaſe as an Alien; for *ſit alienigena* by his Baniſhment, and he is obſerved to be in a worſe Condition than an Alien; for he is marked with *indignatio Principis*. 'Tis true, he cannot forfeit neither Title of Honour, or Knighthood, nor the Lands he had before Exile, unleſs there be ſpecial Sentence or Judgment, as that of the *Spencers* *. 15 *E.* 3. *Fitz.* *Petition pl.* 2.

*Totle's *Magna Charta*, *fol.* 50, 51.

If the Father be in exile, this hinders not the Freedom of the Son, for the ſame is not a thing deſcendible; for ſhould it be ſo, then the Baniſhment of the Father would make a Forfeiture of the Freedom; but the Son has this Freedom by his own Birth, as a Purchaſe, and not by the Death of his Father by Deſcent: Like the Caſe where *J. S.* hath many Children, and then he confeſſeth himſelf a Villain to *J. D.* in a Court of *Record*; yet his Children formerly born are Freemen, and no Villains; the Reaſon is, becauſe they were free by their own Births; but the Inheritance is inthralled, becauſe it is to come to the Heir by Deſcent.

XI. A Freeman of a City or Borough may be made divers ways, as my Lord *Coke* obſerves. 8 *Rep. fol.* 126. Caſe City of *London*.

1. By Service.
2. By Birth, by being the Son of a Freeman.
3. By Purchaſe or Redemption,
4. At *Briſtol* by *Marriage*.

Sir

Fol. 12. Sir *John Davies* in his *Iriſh* Reports obſerves the ſame for Law. St. *Paul* was born at *Tarſus* in *Cilicia*, which was under the Obedience of the *Romans*, by virtue of which he challenged the Privilege of a *Roman Citizen*; but it was accounted no more than a *National Freedom*; like that of *Calvin*, who claimed the general Freedom of an *Engliſhman*, being born in *Scotland*, but under the Obedience of the King of *England*; but that Challenge made not St. *Paul* free of the private Cuſtoms, Privileges, and Franchiſes of *Rome*, no more than *Calvin*'s Birth made him a free Citizen of *London*, to the particular Cuſtoms of that City.

King *Edward* the Third granted to *John Falcount de Luca*, an Apothecary of the City of *London, quod ipſe omnibus libertatibus quas Cives Civitatis prædict' habent in eadem Civitate alibi infra Regnum* Angl' *noſtrum habeat, gaudeat & utatur, &c. Rot. Pat.* 32 *E.* 3. in the Tower; yet it was held, that this Grant did not make him a Freeman of the City, for it cannot be attained but by one of thoſe ways.

The King, by his Letters Patents, cannot make one a Freeman of *London*, * yet he may thereby make him a Freeman of his Kingdom.

* Caſe of the City of *London*, *Co.* 8. *Report*.

If one born in a City, of Parents that are not free, the Child hereby is no Citizen by Birth; and if one be born of free Parents out of the Place of Privileges, as *London*, &c. he yet is a Freeman by Birth; yet in the *Charter* granted to *Yarmouth*, the Words were, *Conceſſimus Burgenſibus de Magna* Yarmutha *de villa prædict. oriundis*, that they ſhould have ſuch Liberties: So that ſpecial Words may alter the Caſe.

Confirmed by *Magna Charta, cap.* 9. *Rot. Parl.* *London* had many Royal Franchiſes granted them from time to time, and were often by former Kings ſucceſſively confirmed, nor wanted they a Share when the great Charter was granted, to have their ancient Liberties ſecured; nor were the ſucceeding Princes ſlack in their Royal Grants and Confirmations; but eſpecially *Richard* II. who in Par-
7 *R. num.* 37. liament granted and confirmed to them all their ancient Cuſtoms and Liberties, with this Clauſe, *Licet uſi non fue-*
9 *E.* 2. *cap.* 2. *rint vel abuſi fuerint*, and notwithſtanding any Statute to
29 *E.* 3. *cap.* 2. the contrary; amongſt the Number of their many Privi-
27 *E.* 3. *cap.* 11. leges, the Freedom of the ſame was accounted of no ſmall
7 *H.* 4. *cap.* 1. Importance, ſince in divers Parliaments it was very much aimed at, and endeavoured to be impaired; but at laſt they

obtained

obtained a moſt gracious and Royal Confirmation in Parliament of their ancient Liberties, amongſt which it is declared, that no Merchant, being a Stranger to the Liberty of the ſaid City, ſhould ſell any Commodities within the Liberty of the ſaid City, to other Merchant-Strangers; nor that any ſuch Merchant-Stranger ſhould buy of any other Merchant-Stranger ſuch Merchandize within the Liberty of the ſaid City, without Forfeiture thereof, ſaving that any Perſon, Lord, Knight, *&c.* may buy within the Liberties of any Merchant-Stranger Merchandizes in groſs for their own Uſe, ſo that they do not ſell them again to buy any other. And as this City by Cuſtom may preclude any Perſon, not being free of the ſame, to ſell in ſuch manner upon ſuch Pain; (*a*) ſo any other City, which are Boroughs or Cities by Preſcription within this Realm, may have the like Cuſtom, and the Goods ſold or bought by ſuch, may be ſubjected to Forfeiture; but the ſame cannot be good by Charter or Grant. 8 *Co.* 125. a.

9 *H.* 4. this Act is not printed.

(*a*) *Vide Salk.* 204. where 'tis held, that ſuch Cuſtom is an Injury to the Party, and a Prejudice to the Publick.

A compleat Freeman is ſuch a one as hath challenged his Freedom, and taken the Freeman's Oath, and is admitted into the Society and Fellowſhip of the Freemen, Citizens, and Burgeſſes; otherwiſe, he hath but a bare Right to his Freedom.

Lucas's Rep. 146. 173. *J. Bagg*'s Caſe. 11 Rep. 93. b.

A Bond to reſtrain a Man from trading in a particular Place, if made upon a reaſonable Conſideration, is good; *ſecus* if it be on no reaſonable Conſideration, or to reſtrain a Man from trading at all.

1 *Peer Williams*'s Reports 181.

CHAP.

CHAP. II.

Of Aliens, as in relation to their Eſtates Real and Perſonal.

I. *Of an Alien his Ability and Diſability in the taking and enjoying of Eſtates Real and Perſonal.*
II. *Of his Capacity in purchaſing, and Diſability to transfer by an hereditary Deſcent.*
III. *Of the Rules of Deſcents, according to the Laws of ſeveral Countries.*
IV. *Of Deſcents, according to the Rules of the Common Law of* England, *lineal and collateral.*
V. *Of Impediments in one that is not the* medius anteceſſor.
VI. *Of Impediments in one that is the* medius anteceſſor *lineal and collateral.*
VII. *Of the Statute of* Natis ultra Mare, *and Iſſues born beyond Seas.*
VIII. *The Lord* Coke's *Opinion, that if an Alien has Iſſue two Sons Denizens, the one purchaſes Land, and dies, the other cannot inherit them, debated and refuted.*
IX. *Of Foreign Births, which do not create a Diſability.*
X. *Of Aliens not diſabled by Law to bring either real or perſonal Actions.*
XI. *Of Office that muſt entitle the King to an Alien's Eſtate.*
XII. *Of ſome particular Immunities, and other Matters relating to an Alien.*

7 *Co.* 16. a. *Yelverton* 199. I. AN *Alien* is one born in a ſtrange Country, under the Obedience of a *ſtrange Prince* and *State*, and out of the Legiance of the *King of England*, and can have 1 *Inſt.* 2. a, b. no real or perſonal Action for, or concerning Lands; and therefore if he purchaſe Lands, Tenements, or Hereditaments, to him and his Heirs, albeit he can have no Heir, yet he is of Capacity *to take* a Fee-ſimple, but not *to hold*; for the King upon *Office* found ſhall have it by his *Prerogative*.

Dyer 283. So it is if he purchaſe Lands and dies, the Law doth caſt the Freehold and Inheritance upon the *King*.

1 *Inſt.* 2 b. But if he purchaſe or take a Leaſe for Years of a Houſe or a Warehouſe, which is for the accommodating him as a *Merchant-Stranger*, whoſe Prince or State is in League with ours, there he may hold the ſame, for that the ſame is incident to *Commerce*.

1 *Inſt.* 2. b. And in that caſe, if he departs and relinquiſhes the Realm, the King ſhall have the ſame; ſo it is, if he be no *Merchant*.

The

The like Law is, if he takes a Leaſe of Meadows, Lands, Woods or Paſtures, the King ſhall have the ſame; for the Law provides him nothing *but a Habitation to trade and traffick in as a Merchant*. *Paſch. 29 Eliz. Sir James Croft's Caſe by the Judges.*

II. Though he may take by Purchaſe by his own *Contract*, that which he cannot retain againſt the King, yet the Law will not enable him by an Act of its own to transfer by hereditary Deſcent (the Alien dying, his Iſſue a *Denizen* born, the Land will not deſcend) or to take by *an Act in Law*; for the Law, *Quæ nihil facit fruſtra*, will not give him an Inheritance or Freehold by an Act in Law, for he cannot keep it. *1 Vin. 417. Collingwood and Pace's Caſe.*

Therefore the Law will not give him	1. By Deſcent. 2. By Courteſy. 3. By Dower. 4. By Guardianſhip.

And in reſpect of that Incapacity he reſembles a Perſon *Attaint*, but with this Difference;

The Law looks upon a Perſon *Attaint* as one that it takes notice of, and therefore the eldeſt Son attainted overliving the Father, though he ſhall not take by Deſcent in reſpect of his Diſability, yet he ſhall hinder the Deſcent to the younger. *Vide Inf. 8. ai*

But if the eldeſt Son be an *Alien*, the Law takes *no notice of him*, and therefore as he ſhall not take by Deſcent, ſo he ſhall not impede the Deſcent to the younger Brother: As for inſtance, if there be three Brothers, the eldeſt an Alien, the other two naturalized, and the middle Brother purchaſe, and dies without Iſſue, the younger Brother ſhall have the Land. *32 Ed. 3. Cosinage. Cro. Jac. 539. Dr. & St. Di. 1. c. 7.*

III. Concerning the Rule of Deſcents, we are not to govern ourſelves therein by the general notions of *Love*, or *Proximity of Nature*, but by the *Municipal* Laws of the Country wherein the Queſtion ariſeth; for the various Laws of divers Countries have variouſly diſpoſed the manner of Deſcents, even in the ſame Line and Degree of Proximity: For inſtance, the Father certainly is as near of kin to the Son, as the Son is to the Father, and is nearer in Proximity than a Brother, and therefore ſhall be preferred as next of kin in Adminiſtration to the Son's Eſtate.

According

Ratcliff's Caſe. 3 Coke 37. Seld. de ſucceſſionibus apud Hebræos, cap. 20.

According to the *Jews*, for want of Iſſue of the Son, the Father ſucceeds, excluding the Brothers; and that hath been the Uſe and Conſtruction of the *Jewiſh Doctors* upon *Numb.* xxvii. 9. but the Mother was wholly excluded.

2. According to the Proviſion of the *Greeks* for the Succeſſion or Excluſion of the Father, is left doubtful.

Comment on *Littleton, fol.* 10. b.

3. By the *Roman* or *Civil Law*, according to the Eſtimation of the *twelve Tables*, the Father ſucceeded in the Purchaſe of the Son for want of Iſſue of the Son, under the Title *proxim. agnato*, and ſo was the Uſe; but my Lord *Coke* ſuppoſes the contrary.

Tit. 1. *de hæredibus ab inteſtato venientibus* Goodwyn *Antiq; de Teſtamentis, fo.* 233.

But taking the whole Inſtitution of *Juſtinian*, the Son dying without Iſſue, his Brothers, Siſters, Father, or Mother, do ſucceed him as well to Land as Goods, in a kind of *Coparcenary*.

Cuſtoms *Normand. c.* deſcheancres.

4. According to the Laws of *Normandy*, (which in ſome things have a Cognition with our Law) his Brothers are preferred before the Father, (if the Son die iſſueleſs) but his Father before his Uncle.

Lit. §. 3.

5. According to the Laws of *England* the Sons dying ſans Iſſue, or Brothers, or Siſters, the Father cannot ſucceed, but it deſcends to the Uncle.

1 *Inſt.* 10.a,b.

IV. There be two kinds of Deſcent, according to the *Common Laws* of this Realm.

Hales's Hiſt. of the Law, *ch.* 11.

1. *Lineal*, from the Father or Grandfather to Son, or Grand-ſon.
2. *Collateral* or *tranſverſed*, as from Brother to Siſter, Uncle to Nephew, and *è converſo:* And both theſe again of two ſorts.

1. *Immediate*, as in Lineals from Father to Son.

Grotius *de Jure Belli ac Pacis, lib.* 2. *cap.* 7.

2. *Mediate*, as in Lineals from Grandfather to Grandchild, where the Father dying in the Life-time of the Grandfather, is the *medium differens* of the Deſcent.

Collateral, as in Lineal, from Uncle to Nephew, or *è converſo*.

And this mediate Deſcent, or mediate Anceſtor, though to many Purpoſes it be immediate; for the Father dying in the Life of the Grandfather, the Son ſucceeds in point of Deſcent in the Lands immediately to the Grandfather; and in a Writ of *Entry* ſhall be ſuppoſed to be in by the Grandfather, and not in the *poſt & cui*.

This

This is called a mediate Deſcent, becauſe the Father is the *Medium* through whom the Son derives his Title to the Grandfather.

In immediate Deſcents there can be no Impediment, but what ariſes in the Parties themſelves: For, inſtance, the Father ſeized of Lands, the Impediment that hinders the Deſcent muſt be in the Father or Son, as if either of them be Attaint or an Alien.

In mediate Deſcents, a Diſability of being an Alien or Attaint, in him that is called the *medius anteceſſor*, will diſable a Perſon to take by Deſcent, though he himſelf have no ſuch Diſability.

In *Lineal* Deſcents, if the Father be Attaint or an Alien, and hath Iſſue a *Denizen* born, and die in the Life-time of the Grandfather, the Grandfather dies ſeized, the Son ſhall not take, but the Land ſhall *eſcheat*.

In *Collateral* Deſcents, *A.* and *B.* Brothers, *A.* is an Alien or Attaint, has Iſſue *C.* a Denizen born, *B.* purchaſes Lands and dies without Iſſue, *C.* ſhall not inherit, becauſe *A.* which was the *medius anteceſſor* or *medium differens*, is uncapable. *Dyer, 274. Graye's Caſe.*

V. But in any Deſcents, the Impediment in an Anceſtor that is not *medius anteceſſor*, from whom and to whom, will not impede the Deſcent.

As for inſtance, the Grandfather and Grandmother both Aliens, or Attaint of Treaſon have Iſſue, the Father a *Denizen*, who hath Iſſue the Son a *natural born Subject*, the Father purchaſes Lands, and dies, the Son ſhall be Heir to the Father, notwithſtanding the Diſability of the Grandfather, (and yet all the Blood which the Father hath is derived from his diſabled Parents) for they are not *medii anteceſſores*, between the Father and the Son, but paramount. *Courtney's Caſe. Com. Pleas Coron. fol. 141.*

The Law does not hinder, *but that an Alien is of the ſame Degree and Relation of Conſanguinity, as natural born Subjects, or Denizens born*, the Son, the Father and Brother, though Aliens; the Son, Father and Brother, our Law takes Notice of, as well as natural born Subjects, and ſo it was adjudged, for he ſhall be preferred in *Adminiſtration*, though an Alien, *as next of kin*. *Crook Car. 8. 9. Caroon's Caſe.*

But in Caſes of *Inheritance* the Law takes *no notice of him*, and therefore as he ſhall not take by Deſcent, ſo he ſhall not

impede

29 *Ed.* 3. *tit.* *Cozenage* 5. *impede* the Deſcent to the younger Brother: As for inſtance, *A.* an Alien, *B.* and *C.* naturalized by Act of Parliament, (Brothers) *B.* purchaſes Lands, and dies *ſine prole*, *C.* ſhall inherit, and not *A.*

Ramſey's Caſe. 15 *Car.* 2. *in Com. Banc.* *A.* an Alien, *B.* and *C.* his Brothers, both naturalized by Act of Parliament, *B.* purchaſes Lands, and dies without Iſſue, the ſame ſhall not come to *A.* nor to his Iſſue, though a Denizen, but ſhall come to *C.* and his Iſſue; the Law taking no *notice* of *A.* as to *impede* the Succeſſion of *C.* or his Iſſue, though it work a *conſequential Diſability* to bar the Iſſue of *A.* parallel to what the Law calls *Corruption* of Blood, which is a Conſequent of Attainder.

VI. Again, in Lineal Deſcents, if there be a Grandfather a natural born Subject, the Father an Alien, Son natural born Subject, the Father is made a Denizen, he ſhall not inherit the Grandfather; and if the Father dies in the Life of the Grandfather, the Grand-child, *though born after the Denization*, doth not remove neither the Perſonal nor Conſequential Impediments or Incapacity of the Father.

Godfrey and *Dixon*'s Caſe. *Godbolt*, 275. *Cro. Jac.* 539. 2 *Rolls Rep.* 92. *Vaughan* 285. *Levinz* 59. In *Collateral* Deſcents, the Father a natural born Subject has Iſſue two Sons Aliens, who are both made Denizens, and dies without Iſſue, the other ſhall not inherit him.

A. an Alien marries an *Engliſh* Woman, who is ſeized of Lands, and has Iſſue, the Father and Mother dies, yet the Iſſue may inherit the Mother, *non obſtante* the Incapacity of the Father being an Alien.

De Natis ultra Mare, 25 *Ed.* 3. VII. The Statute *de Natis ultra Mare*, declares the Iſſue born of an *Engliſh* Man upon an *Engliſh* Woman ſhall be a Denizen; yet the Conſtruction has been, though

*Cro.Car.*601. an *Engliſh* Merchant marry a Foreigner, and has Iſſue by her born beyond the Seas, *that Iſſue is a natural born Subject.*

*Cro. Car.*601. *Bacon*'s Caſe. But if an *Engliſh* Woman go beyond the Sea, and there marry an Alien, and have Iſſue beyond the Sea, that Iſſue are Aliens.

Prowde's Caſe of *Kent.* If an *Engliſh* Woman marries an Alien beyond the Seas, and then comes into *England*, and has Iſſue, they are not Aliens, but may inherit.

*Com. Lit. fol.*8. 1 *Lev.* 60. 1 *Sid.* 198. 1 *Ven.* 429. *Hard.* 224. VIII. My Lord *Coke* in his *Commentaries* on *Littleton*, ſeems to be of Opinion, that if an Alien has Iſſue two Sons born in *England*, one dying without Iſſue, the other ſhall not inherit him. But the Law is otherwiſe taken at this Day,

Day, as I conceive the Reaſons that have been given, are,

1. Though the Deſcent from one Brother to another Brother be a *collateral Deſcent*, yet it is an *immediate Deſcent*, and conſequently if no Diſability or Impediment can be found *in them*, no Impediment in *another Anceſtor* will hinder the Deſcent between them.

Per L. C. J. *Hales* in *Ramſey*'s Caſe.

That this is an immediate Deſcent, appears,

Firſt, In Point of Pleading, one Brother ſhall derive himſelf as Heir to another, without mentioning any *other Anceſtor*.

Secondly, According to the Computation or *Degrees*, Brother and Brother make but one *Degree*, and the Brother is diſtant from his Brother or Siſter in the *firſt Degree* of *Conſanguinity*, and no more, by the Laws of *England*.

According to the *Civil Law* * Brother and Brother make but *one Degree*, for the Brother is in the *ſecond Degree* from the Brother, yet both make but *one Degree*.

According to the *Canon Law*, † *Frater & Frater*, or *Frater & Soror ſunt in primo gradu.*

And therefore the Laws prohibiting Marriage between Kindred in the *fourth Degree*, take Brother and Siſter to be the *firſt Degree* of the four.

* *Juſt. l.* 9. *tit. de gradibus conſanguinitatis* 38.

† *Decret. Gratiani*, *cap.* 35. *quæſt.* 5.

The Laws of *England*, in Computation of the Degrees of Conſanguinity, agree with the *Canon Law*, and reckon the Brother and Brother to be the *firſt Degree*.

Lit. Sect. 20, 31 *Ed.* 3. *Gard.* 116. *Holland*'s Caſe cited by *Littleton.*

Herewith agree the Cuſtoms of *Normandy*, ‖ which, though in ſome caſes differ from the Laws of *England*, yet herein, and in divers other Particulars touching Deſcents, they agree.

‖ *Servien* in Comptes, degrees in Line Collat. *Solenk*, &c.

Another Evidence to prove, that the Deſcent between Brothers is immediate, is this, (*viz.*) the Deſcent between Brothers differs from all other collateral Deſcents whatſoever, for in other Deſcents collateral *the half Blood does inherit*, but in a Deſcent between Brothers *the half Blood does impede the Deſcent*, which argues, that the Deſcent is immediate.

Brown's Caſe, *Mich.* 1656. *B. R. contra* 5 *E.* 6. Bro. Adminiſtration 47. which prefers the Brother of the half Blood before the Mother.

The Uncle of the Part of the Father has no more of the Blood of the Mother, than the Brother by the ſecond Venter, the Brother by the ſecond Venter has the immediate Blood of the Father with the Uncle (*viz.* the Father's Bro-

ther) has not but only as they meet in the Grandfather; the Brother of the half Blood is nearer of Blood than the Uncle, and therefore ſhall be preferred in *Adminiſtration*.

It is apparent, that if in the Line between Brother and Brother, the Law takes notice how the Father was the *Medium* thereof, the Brother of the ſecond Venter ſhould rather ſucceed to the other Brother, becauſe he is Heir to the Father; therefore in a Deſcent between Brothers the Law reſpects only the *immediate Relation of the Brothers as Brothers*, and not in reſpect of the Father, though it is true, the Foundation of their Conſanguinity is in their Father or Mother.

Again, if the Father, in caſe of a Deſcent between Brothers, were ſuch an Anceſtor as the Law looked upon as the *Medium* that derives the Deſcent from the one Brother to the other, then the Attainder of the Father would hinder the Deſcent between the Brothers: But the Attainder of the Father does not hinder the Deſcent between the Brothers; the Reaſon is, becauſe *the Father is not ſuch a Medium* or *Nexus* that is looked upon by the Law, as the Means deriving ſuch a Deſcent between the two Brothers: As for inſtance of three Caſes, two whereof evince the firſt Propoſition, *(viz.)*

1 *Inſt.* 8. a.

That although the Deſcent from one Brother to another Brother, though it be a collateral Deſcent, yet is an immediate Deſcent, *and that if no Diſability or Impediment ariſes in them*, no Impediment in another Anceſtor will hinder them.

Dyer, 247. *Gray*'s Caſe.

The younger Brother has Iſſue, and is attainted of Treaſon, and dies, the elder Brother has Title to a *Petition of Right*, dies *ſans* Iſſue without a Reſtitution, the younger Brother's Son has loſt that Title; for though the Title were in the Anceſtor that was not attaint, yet his Father that is the *Medium*, whereby he muſt convey that Title was attaint, and ſo the Deſcent was obſtructed.

Com. placit. Coron fol. 241. *Henry Courtney*'s Caſe.

Henry Courtney had Iſſue *Edward*, and was attainted of Treaſon, and died, *Edward* purchaſed Lands, and died without Iſſue, the Siſters and Heirs of *Henry* were diſabled to inherit *Edward*; yet neither *Edward* nor his Aunts were attainted, or their Blood corrupted; yet becauſe *Henry* was the *Medium through whom* the Aunts muſt derive their Pedigree

digree and Conſanguinity to *Edward*, who was attainted, the Deſcent was obſtructed till a Reſtitution in Blood.

But if the Grandfather of *Edward* had been attainted, and not *Henry*, this would not have hindered the Deſcent from *Edward* to the Aunts, becauſe that *Attainder had been paramount* to that Conſanguinity which was between *Henry* and his Siſter, and that is proved by this third Caſe.

William Hobby had Iſſue *Philip* and *Mary*, and was attainted of Treaſon, and died, *Philip* purchaſes Lands, and died without Iſſue; it was adjudged in that caſe, that *non obſtante* the Attainder of *William Hobby*, *Mary* ſhould inherit, becauſe the Deſcent and Pedigree between *Philip* and *Mary* was immediate, and the *Law regards not the Diſability of the Father*. *Mich.* 40, 41. *Eliz.* ruled in the *Exchequer* in the Caſe of *Hobby*.

If the Heir of the Part of the Father be attaint, the Land ſhall eſcheat, and ſhall never deſcend to the Heir of the Part of the Mother; but if the Son purchaſe Lands, and has no Kindred of the Part of the Father, but an Alien, it ſhall deſcend to the Heirs of the Part of the Mother. 49 *E.* 3. 12. *per Tanks* and *Perceba*y.

IX. Thoſe that are born *ſub fide, legiantia, obedientia Domini Regis* are not Aliens; and therefore thoſe that were born in *Gaſcoyn*, *Normandy*, *Aquitain*, *Tournay*, *Callis*, *Guyan*, whilſt they were under the Dominion of the Kings of *England*, were natural born Subjects, and not Aliens. *Co.* 7. *Rep.* 21. *Calvin*'s Caſe.

Scotland is a Kingdom by Union, and therefore thoſe that were born in *Scotland* under the Allegiance of the King, as of his Kingdom of *Scotland*, before the Crown came united, were Aliens born, and ſuch Plea againſt ſuch Perſons was a good Plea; but thoſe that were born ſince the Crown of *England* deſcended to King *James* are not Aliens, for they were born *ſub fide & legiantia Domini Regis*; ſo thoſe that are born at this Day in *Virginia*, *New-England*, *Barbadoes*, *Jamaica*, or any other of his Majeſty's Plantations and Dominions, are natural born Subjects, and not Aliens; ſo likewiſe thoſe that are born upon the King of *England*'s Seas are not Aliens. *Vaughan*, 268. *Craw verſus Ramſey.* Sir *John Burrough*'s Sovereignty of the Seas, *fol.* 102.

X. But if an Alien be made an Abbot, Prior, Biſhop, or Dean, by the Plea of an Alien, we ſhall not diſable him to bring any real or mixed Action concerning the Poſſeſſions that he holds in his politick Capacity, *becauſe the ſame is brought in auter droit*.

Dy. 2. *pl.* 8. *Lutw.* 35. *Salk.* 46.

The like Law is for an Executor or Adminiſtrator, becauſe the Recovery is to another's Uſe, 3 *Cro.* 683. yet ſee the ſame *Book* 142. *pl.* 7.

1 *Brownlow.* 42.

If an Action is brought againſt an Alien, and there is a Verdict and Judgment againſt him, yet he may bring a Writ of Error and be Plaintiff there, and that ſuch Plea is not good in that Caſe.

Goldsborough, fol. 29. *Mich.* 30 *Eliz.* *Coke* 5. *part, Page*'s Caſe, *fol.* 52. *Moore* 4. *Walton ver. Maſhum.* *Dyer* 282. *Alien Staundfort*'s pl. Crown. *Regis. art.* 18. *fol.* 53. *tit.* King Seiſin, *&c.*

Though an Alien may purchaſe and take that which he cannot keep or retain, yet the Law hath provided a mean of Inquiry before he can be diveſted of the ſame, for until ſome *Office* be found, the Freehold is in him.

And this Office, which is to gain to the King a Fee or Freehold, muſt be under the *Great-Seal* of *England*, for a Commiſſion under the *Exchequer-Seal* is not ſufficient to entitle the King to the Lands of an Alien born, for the Commiſſion is that which gives a Title to the King, for before that the King hath no Title; but in caſes of *Treaſon*, there upon Attainder the Lands are in the King without Office, and in that caſe, to inform the Court a Commiſſion may go out under the *Exchequer-Seal.*

An Alien cannot purchaſe Lands for his own Benefit; but he may for that of the Crown. *Lucas*'s Reports 91. 94. 120. 122. 136.

Therefore if Land be deviſed to an Alien, the Crown ſhall have it, *ibid.* 94. Yet if an Alien, Tenant in Tail, ſuffers a common Recovery before Office found, the Recovery is good, *ibid.* 124.

3 *Cro.* 123. *Plowd. Com.* 477. 17 *E.* 3. *fol.* 10 *Hen. Hill*'s Caſe.

XI. If an Alien and a Subject born purchaſe Lands to them and to their Heirs, they are *joint Tenants*, and ſhall join in Aſſize, and the Survivor ſhall hold Place till Office found.

By the finding of this Office the Party is out of Poſſeſſion, if the ſame be of Houſes or Lands, or ſuch things as do lie in Livery; but of Rents, Common, Advowſons, and other Inheritances incorporeal which lie in Grant, the Alien is not out of Poſſeſſion (be they appendant or in groſs) therefore if an Information or an Action be brought for the ſame, the Party may traverſe the *Office* in that Court, where the Action or Information is brought for the King.

And

And if the King obtains not the Poſſeſſion within the Year after the Office found, he cannot ſeize * without a *Scire facias*. * 29 *Aſſize* 30, 31, 32. *Aſſize Travers* 32. vouched in *Staunford plt.* *fol.* 54. *cap.* 18.

It is not for the *Honour of the King* (an Alien purchaſing of a Copy-hold) to ſeize the ſame, for that the ſame is a baſe Tenure; and ſo it was adjudged, † where a Copy-hold was ſurrendered to *J. S.* in Truſt, that one *Holland* an Alien, ſhould take the Profits thereof to his own Uſe and Benefit; upon an Inquiſition taken, it was adjudged the ſame was void and ſhould be quaſhed, becauſe the King cannot be intitled to the Copy-hold Lands of an Alien, nor to the Uſe of Copy-hold Lands, as the principal Caſe was. † *Styles* 20.

XII. An Alien Infant under the Age of 21 Years, cannot be a Merchant Trader within this Realm, nor can he enter any Goods in his own Name at the Cuſtom-houſe. 13 & 14 *Car.* 2. *c.* 11. §. 10.

If an *Engliſh* Man ſhall go beyond the Seas, and ſhall there become a ſworn Subject to any *Foreign Prince* or *State*, he ſhall be looked upon in the Nature of an Alien, and ſhall pay ſuch Impoſition, as Aliens; if he comes and lives in *England* again, he ſhall be reſtored to his Liberties. 14, 15 *H.* 8. *cap.* 4.

An Alien is robbed, and then he makes his Executor, and dies, and afterward the Goods are waſt, the Lord of the Franchiſe ſhall not have them, but the Executors. *Vide* 13 *E.* 4. 1 *Ro.* 144. 3 *Bulſtr.* 9.

All Perſonal Actions he may ſue as on a Bond, ſo likewiſe for Words; for the *Common Law*, according to the Laws of Nations, protects Trade and Traffick, and not to have the Benefit of the Law in ſuch caſes is to deny Trade. 1 *Bulſt.* 134. *Yelverton* 198. *Turloote verſus Monſon* 8 *Jac.* *B. R.* *Moore*, *fol.* 431.

But yet Aliens and Denizens are reſtrained by the Statute of 5 *Eliz.* to uſe any Trade, not having ſerved ſeven Years as Apprentices within the Realm. *Vide* the Statute what Trades, *Trin.* 12 *Car.* 1. at *Serjeant's-Inn* in *Fleet-ſtreet*, by all the Judges. *Hutton*'s Reports, *fol.* 132. but *quære* that Reſolution.

An Alien Enemy commorant here by the King's Licence, and under his Protection, may maintain Debt upon Bond, although he came not with ſafe Conduct. *Lord* Raymond 282.

Where an Alien ſhould take by courſe of Deſcent, there the Eſtate ſhall go over to him, to whom it would have gone in caſe the Alien had been already dead; as, where Tenant in Tail has Iſſue two Sons, and the eldeſt is an Alien, the younger Brother ſhall inherit. *Lucas* 116. Yet if an Alien be Tenant in Tail, Remainder to a natural born Subject, the Remainder-man cannot come in until the Eſtate Tail be ſpent. *Lucas* 120.

CHAP.

CHAP. III.

Of Naturalization and Denization.

I. *Whether the Kings of* England *can naturalize without Aƈt of Parliament.*

II. *What Operation Naturalization hath in reference to remove the Diſability ariſing from themſelves.*

III. *What Operation Naturalization hath in reference to remove Defeƈts ariſing from a lineal or collateral Anceſtor.*

IV. *Where Perſons born out of the Realm may inherit by the Laws of* England.

V. *A Kingdom conquered, and united to the Crown of* England, *whether by granting them a Power to make Laws can implicitely create in them ſuch a Sovereignty, as to impoſe on the Realm of* England.

VI. *Of Perſons naturalized by a Kingdom dependent, whether capable of impoſing on one that is abſolute.*

VII. *Of Kingdoms obtained by Conqueſt, how the Empire of the ſame is acquired, and how the Conqueror ſucceeds.*

VIII. Ireland, *what Condition it was accounted before the Conqueſt in reference to the Natives of the ſame, and whether by making it a Kingdom, they can create a Foreigner as a natural born Subjeƈt of* England.

IX. *Of Aliens in reference to the Tranſmiſſion of their Goods and Chattels by the Laws of* France.

X. *Of the Privileges the Kings of* England, *of old, claimed in the Eſtates of* Jews *dying commorant here, and how the ſame at this Day ſtands.*

XI. *Of Perſons born in Places annexed or claimed by the Crown of* England, *how eſteemed by the Laws of the ſame.*

XII. *Of Denization, and what Operation it hath according to the Laws of* England.

XIII. *Where an Alien is capable of Dower by the Laws of* England, *and where not, and of the total Incapacity of a* Jew.

XIV. *Whether a Denizen is capable of the Creation and Retention of Honour, by the Laws of* England.

I. THE Father and Mother are the Fountain of the Blood natural, and as it is that that makes their Iſſue, Sons or Daughters, ſo it is that that makes them Brothers and Siſters; but it is the civil Qualifications of the Blood that makes them inheritable one to the other, and capable of enjoying the Immunities and Privileges of the Kingdom; but that is from another Fountain, *viz.* the Law of the Land, which finding them legitimate, doth tranſplant them into the Civil Rights of the Land, by an Aƈt called Naturalization; which does ſuperinduce and cloath that natural Canſanguinity with a Civil hereditary Quality,

Quality, whereby they are enabled not only to inherit each other, but alſo to enjoy all the Immunities and Privileges that mere natural born Subjects may or can challenge.

II. According to the Laws of *Normandy* the Prince might *naturalize*; but ſuch *Naturalization* could not diveſt the Deſcent already veſted. *Serv. lib. 2. cap. 12.*

But according to *our Law* by no way but by *Act of Parliament*, and that cures the Defect as if they had been born in *England*, and no Man ſhall be received againſt an *Act of Parliament* to ſay the contrary. *1 Inſt. 129. a.*

Therefore if the Father an *Alien* has Iſſue a *Son* born *here*, and then the Son is naturalized, the Son ſhall inherit.

If the Father, a *natural born* Subject, has Iſſue an *Alien* who is *naturalized*, the Father dies, the Son ſhall inherit. *Com. Lit. 129.*

III. *Naturalization* does remove all that *Diſability* and *Incapacity*, which is in Aliens in reſpect of themſelves, and ſo puts them intirely in the Condition as if they had been *born in England.*

The *Relative* Terms, as if *born* in *England*, is generally uſed to ſupply the *perſonal Defect* of the Parties naturalized, ariſing from their *Birth out of England*, and therefore ſhall never be carried to a *collateral* Purpoſe, nor cures a Diſeaſe of *another* Nature, as *half Blood*, *Illegitimation*, and the like; but all Diſeaſes, whether in the *Parties* themſelves, or reſulting from the Anceſtor, it cures.

Acts of Parliament of this Nature may be ſo penned, as to cure Defects in the *Father* or *Anceſtor*, or in the Parties *themſelves*.

If *Reſtitution* in Blood be granted to the *Son* by Act of Parliament, this cures that *Diſability* that reſulted from the *Father's* Attainder, and that not only to the *Son*, but alſo to the *collateral Heirs* of the Father; the true Reaſon of this is, becauſe *the Corruption of the Blood by the Attainder is only of the Blood of the Father, for the Son's Blood or collateral Heir was not at all corrupted*; for the Scope of the Act *taking* notice of the Father's Attainder, does *intentionally* provide againſt, and remove it, for otherwiſe the ſame had been uſeleſs. *Coke 3. Inſt. fol. 241.*

But in *Naturalization*, without expreſs Words, it takes no notice of the Defects in the Father or other Anceſtor, nor removes them.

And therefore ſuch *Acts of Parliament* as take no other notice but of the *Perſon naturalized's Foreign Birth*, the ſame cures not any Diſability of *Tranſmiſſion hereditary* between the Father, Brother, or any other Anceſtor, *reſulting* from the Diſability of them without *actually naming of them*; As for inſtance, the Father an Alien, the Son naturalized by Act of Parliament, the Father or any other Anceſtor an Alien purchaſes Lands and dies, the Son ſhall not take by reaſon of the Diſability in the Father, but there *may be Words* inſerted in the Act that may take away the Impediment.

IV. There are four ways by which Men born out of *England*, may inherit in *England*, beſides by the Statute of *Edward* the Third, *De Natis ultra mare*.

1. If they be born in any Dominion of the King's, when he is actually King of *England*.

2. If they be made inheritable by Act of Parliament in *England*.

Calvin's Caſe, *fol.* 21. b.

3. If they be born Subjects to a Prince holding his Kingdom or Territories as Homager and Leigeman to the King of *England* during the Time of his being Homager: So the *Welch* were inheritable in *England* before 12 *Ed.* 1. though Subjects to the Princes of *Wales*, who were Homagers to the King of *England*. So were the *Scotch* in *Edward* the Firſt's Time; but when once the Homage determines, then they become Aliens, otherwiſe Subjects, and upon that Reaſon *Magdulph* a *Scot* appealed * from the Judgment of his Prince to *Edward* the Firſt *ut Superiori Domino Scotiæ*; but then it muſt be underſtood where ſuch Prince is Homager *ſubjectionis*, and not only *infeodationis*, for another King may hold of the King of *England* an Iſland or other Territory by Tenure, and not be his Subject.

* *Placit. Parl.* 21 *Ed.* 1. *fol.* 152, 157.

4. If the King of *England* enters in a hoſtile manner the Territories of another Prince or State, and any be born within any of the Places or Guards poſſeſſed by the King's Army, they are looked upon in Law to be within his Protection, and ſuch Perſon born is a natural born Subject of *England*; but then he muſt be of Parents Subjects †, not hoſtile; and therefore a Baſtard born in *Tangier* is capable of purchaſing Land in *England*, if his Parents were Subjects.

† 5 *Eliz. Dyer. fol.* 224. *placit.* 29. *Craw verſ. Ramſey*, Lord *Vaughan*, *fol.* 301.

V.

V. Thoſe that are born in *Ireland*, and thoſe that are born in *Scotland*, are all alike; for their Births are within the King's Dominions, and they are born under the like Subjection and Obedience to the King, and have the like Band of Allegiance *ad fidem Regis*; yet if a *Spaniard* comes into *Ireland*, and by the *Parliament* is there naturalized, though perhaps this may qualify and cloath him with the Title of a *natural born* Subject of *Ireland*, yet it has been conceived, that it will not make him a natural born Subject of *England*.

For the Union of *Ireland* to that of *England*, is different from that of *Scotland*; for the firſt is dependent as a Kingdom conquered, the latter independent. Though *Henry* the Second, after his Conqueſt of that Nation, did remit over from *England* the ancient *modus tenendi Parliamentum*, enabling them to hold Parliaments, which after was confirmed by King *John*; yet that was by no other Force than bare Letters Patents. Now when a Nation is once conquered, there remains no Law, but that of the Conqueror; and though he may incorporate ſuch conquered Nations with his own, and grant unto them their ancient Parliamentary Ways of making of Laws; yet the Conqueror can no ways grant unto them a Power, by virtue of ſuch Grant or Confirmation, as to impoſe upon his own Country; for he himſelf before ſuch Conqueſt, could not make a natural born Subject without Act of Parliament, and moſt certainly his Conqueſt adds nothing to his Power, tho' it does increaſe his Dominion.

My Lord *Coke* ſo conceives, but Mr. *Selden* denies that ever there was any ſuch *modus tenendi*, but the ſame is an Impoſture. *Vide* his Tit. of Honour, *fol.* 708. 710, 718, to 721.

The Doctrine with reſpect to *Scotland* is intirely altered by the Union ſince our Author wrote.

VI. Again, Kingdoms that are abſolute under one Prince, *ad fidem Regis*, there the Acts of each other are reciprocate, and one naturalized by the Parliament of *Scotland*, is as naturalized in *England*, becauſe *Scotland* is a Kingdom abſolute, and yet in the Caſe of *Craw* and *Ramſey* * it is there held, that an Alien naturalized in *Scotland* remains an Alien notwithſtanding; but *Ireland* is a Kingdom dependent and ſubordinate to the Parliament of *England*, for the Parliament in *England* can make an Act to bind *Ireland*, but not *è converſo*. Now to be a Native of *Ireland*, is the ſame as to be born

Selden's Titles of Honour, *fol.* 213. in *Scotland*, the Title is *Carolus Scotiæ, Angliæ, Franciæ, & Hiberniæ Rex*; but in *Ireland*, *Angliæ, Scotiæ*. Note *Scotland* is not a Dominion belonging to the Crown of *England*, but to the King of *England*.

* *Vaughan* 301.

born in *Ireland*, but that is by the Laws of *Ireland*; but to be born in *Ireland*, and to be the ſame as to be born in *England*, muſt be by the Laws of *England*: But there is no Law that hath enabled them with ſuch a Power, as to naturalize further than their own Laws extend; but the Law of *Ireland* does not extend into *England*, therefore Naturalization in *Ireland* operates only in *Ireland*, becauſe of the Failure of Power.

VII. Again, Kingdoms that are conquered, the Empire of the ſame may be acquired by the Conqueror, only as it is in a King, or other Governor, and then the Conqueror only ſucceeds in his Right, and no further *; or alſo as 'tis in the People, in which Caſe the Conqueror hath Empire, ſo as that he may diſpoſe of it, or alienate it as the People themſelves might; *for 'tis one Thing to inquire of the Thing, another, of the Manner of the holding of it*, the which are applicable not only to corporal Things, but incorporeal alſo: For as a Field is a thing poſſeſſed, ſo is a Paſſage, an Act, a Way; but theſe things ſome hold by a full Right of Property, others by a Right of Uſufructuary, others by a temporary Right. Again, by the Will of the Conqueror, the Kingdom or Republick that is ſo conquered, may ceaſe to be a Kingdom or Commonwealth, either ſo that it may be an Acceſſion of another Kingdom or Commonwealth, as the *Roman* Provinces, or that it may no ways add hereto any Kingdom or Commonwealth, as if a King waging War at his own Charge, ſo conquer and ſubject a People to himſelf, that he will have them governed, not for the Profit of the People chiefly, but of the Governor, which is a Property of that we call *Herile Empire* †, not of Civil; for Government is either for the Profit of the Governor, or for the Utility of the Governed; this hath Place among Freemen, that among Maſters and Servants. The People then that are kept under ſuch Command, will be always for the future not a Commonwealth, but a great Family: Hence it is that we may plainly underſtand, what kind of Empire that is, which is mixed of Civil and Herile, that is, where Servitude is mixed and mingled with ſome perſonal Liberty: For if the People are deprived of Arms, commanded to have no Iron but for Agriculture, to change their Lan-

* From hence it is, that the King at this Day cannot alien or ſell *Ireland* without an Act of Parliament, for they whoſe Right he ſucceeds, could not do it, *Co.* 4. *Inſtit. fol.* 357. nor can he grant, *Portus Maris obedientiis advocationibus & patronationibus Eccleſiarum Metropoliticarum & Cathedralium Cancellar. Juſticiar.* nor *mero & mixto Imperio*, and many more, all which are inſeparably annexed to a Kingdom.

† *Imperium aliud eſt ob utilitatem ejus qui regitur, hoc inter liberos locum habet, illud inter dominos & ſervos*, Ariſt. *l.* 7. *de Republica.*

Language and Courſe of Life, and abſtain from the Uſe of many of their Cuſtoms, to be confined * to their own Houſes, Caſtles, or Plantations, nor wander abroad; to be governed by ſuch Laws as the Conqueror ſhould tranſmit to them †, all which are the Tokens of a Nation by Conqueſt made ſubordinate to the Conqueror, and are part Herile, and part Civil; and though they may remain a Kingdom, and abſolute within themſelves as to the making of Laws, to oblige each other, yet they can no ways impoſe on their Conqueror; for though that be true, which in *Quintilian* is alledged on the Behalf of the *Thebans*, That that only is the Conqueror's which he holds himſelf; but an incorporeal Right cannot be holden, and the Condition of an Heir and of a Conqueror is different, becauſe the *Right* paſſeth to the former by the Deſcent, but only the *Thing* to the laſt by virtue of the Conqueſt. But certainly that is no Objection, for he that is Maſter of the Perſons, is alſo Maſter of the Things and of all Right which does belong to the Perſons: for he that is poſſeſſed ‖, doth not poſſeſs for himſelf, nor hath he any thing in his Power who hath not himſelf; and ſo it is if he leaves the Right of a Kingdom to a conquered People, he may take to himſelf ſome things which were the Kingdom's, for it is at his Pleaſure to appoint what Meaſure he will to his own Favour: From hence it is we may obſerve what ſort of Empire that Kingdom is at this Day.

* Caſe of the Earl of *Shrewsbury* on the Stat. of 28 *H.* 8. of Abſentees, 4 *Inſt.* preſcribes, *fol.* 354.

† Or elſe they came to *London* for them, *Cl.* 18 *H.* 3. *m.* 17. *Arioviſtus apud Cæſarem, jus eſſe belli ait, ut qui viciſſent, iis quos viciſſent quemadmodum vellent imperarent. de bello Gallico, l.* 1.

‖ *Leg. qui in ſervitute eſt, de reg. Juris Leg. ſi eveniet D. ad. Leg. Jud. de Adult.*

VIII. Now *Ireland*, before the ſame became united to the Crown by the Conqueſt of *Henry* the Second, the Natives were mere Aliens, and out of the Protection of the Laws of this Realm; yet when once they became a conquered People, and ſubject to the Crown of *England*, and united *ad fidem Regis*, then did ariſe their Allegiance; but that *Union* neither made them capable of the Laws of *England*, nor of their own, till ſuch time as the Conqueror had ſo declared them: Now what do they deſire in order to revive their Government? Firſt, they humbly beg of King *Henry* the Second, that ſince he was pleaſed that they ſhould remain as a diſtinct Dominion, *that their ancient Cuſtoms or Uſages ſhould not continue; that he would be pleaſed to ordain,*

Calvin's Caſe. *Lib.* 7. *fol.*23.

dain, that ſuch Laws as he had in England * *ſhould be of Force, and obſerved in* Ireland; purſuant to which he grants them power to hold Aſſemblies by the *three Eſtates of the Realm*, and that they ſhould be regulated according to the Inſtitution and manner of the Parliaments in *England*, ſhould have the Benefit of *Magna Charta*, and other the great Laws of *England* †, and by ſuch Means put them into a Method of governing themſelves according to the known Ways of *England*, and to make ſuch Laws as ſhould bind among themſelves; and by following the Example of thoſe of *England* ‖, their Judgment might be ſupervifed, and corrected according to the Juſtice and Laws of *England*, by Writs of Error, Appeal and the like.

* For at a general Council at *Caſſels* of all the Clergy there, *Anno* 1170. Eccleſiaſtical Laws of *England* were eſtabliſhed, and made of Force in *Ireland*, *Geraldus Cambrenſis Topographia Hiberniæ, lib.* 3. *cap.* 18. *Pat.* 6 *E.* 1. *m.* 13. *Hibern.* † *Matthew Paris Hiſt. Angl. pag.* 121. *Leges Angliæ ab omnibus ſunt gratè acceptæ.* ‖ 7 *Coke* 23. *Ryly's Placita Parliam.* 198 to 208.

Now here is no continuing or reviving their ancient Government, but the introducing a new one, part Civil, and part Herile; nor indeed had they before any ſuch thing as a Parliament there, or general Aſſembly of the three Eſtates; for when *Henry*, the Second went over, there were ſeveral Kings or Scepts, who had their ſeveral and diſtinct Aſſemblies; but when they ſubmitted, this great Aſſembly of Eſtates which he conſtituted, was a collection out of all of them, for their future well Government; ſo that whatſoever *modus* of Regimen the Conqueror declared, it was no more than for the well governing of the Place, and making ſuch Laws as were neceſſary, and proper amongſt themſelves: But for them to impoſe, by virtue of an Act of Naturalization, upon an abſolute Kingdom as *England*, without the Conſent of the three Eſtates of the ſame, ſurely was never intended, much leſs effected: The Caſe is both great, dubious, and curious, therefore *quære*.

Sir *John Davies* on the Conqueſt of *Ireland*, 103, 104, 105.

Lord *Vaughan*, *fol.* 301. *Craw verſus Ramſey.*

IX. By the Laws of *France* all Perſons not born under the Legiance of that King, are accounted Aliens, and if they die, the King is entitled to their Eſtates; for all ſhall be ſeized into his *Exchequer*, or *Finances*; but if they make a Will, the Prerogative is diſappointed: Yet that extends only to Chattels perſonal, in which Strangers paſſing through the ſame, have greater Immunities than Aliens there reſident; for Travellers dying without Will, the

Heirs or Executors ſhall have Benefit and Poſſeſſion of their Eſtates.

X. The like Priviledge the Kings of *England* formerly claimed in the Goods and Eſtates of the *Jews* after their Death, if the Heir ſued not, and paid a Fine to the King to enjoy them, as by this Record appears.

Juratores ſuper ſacrum ſuum dicunt quod prædictum Meſſuagium fuit quondam Eliæ le Bland, *qui, &c. diem clauſit extremum, et quia mos eſt Judaiſmi quod Dominus Rex omnia bona Cattalla Judei mortui de jure dare poterit cui voluerit, niſi propinquior hæres ejuſdem Judæi finem fecerit pro eiſdem; dicunt quod Dominus Rex dictum Meſſuagium dare poterit cui voluerit ſine injuria alicui facienda, ſi ita ſit quod hæres dicti* Eliæ, *finem non fecerit pro Catallis ejuſdem* Eliæ *habendis, &c.* *Eſcheat An. 52. H. 3. Num. 31.*

But whether the ſame is now uſed, may ſeem doubtful; for the Goods of Aliens eſcheat not at this Day to the Crown, but Adminiſtration ſhall be committed to the next of kin. *Caron*'s Caſe. *Hobby*'s Caſe. *Stephen*'s Caſe.

XI. By the Laws of **France**, *Flanders*, *Milan*, *Savoy*, and the *Frenche Compte*, though poſſeſſed by ſeveral other Princes, yet the Natives of the ſame partake in the Immunities with the natural born Subjects of *France*, and if they die without Will, their Heirs claim their Eſtates; the Reaſon given, becauſe, ſay they, thoſe Countries were never alienated from them, but were always annexed to the Crown of *France*, who acknowledges them to be his Subjects to this Day.

But in *England* it is otherwiſe, for thoſe that are born in *Gaſcoin*, *Normandy*, *Aquitain*, and thoſe other Territories which were formerly the Poſſeſſions of the Crown of *England*, in which if any had been born when ſubject to the ſame, they would have been natural born Subjects, yet now are eſteemed Aliens; and ſo was the Caſe vouched by *Sbard*, of a *Norman*, who had robbed together with other *Engliſh*, divers of his Majeſty's Subjects in the narrow Seas, being taken and arraigned, the *Norman* was found guilty only of Felony, and the reſt of Treaſon; for that *Normandy* being loſt by King *John*, was out of the Allegiance of *Ed.* III. and the *Norman* was accounted as an Alien. *Note*, This was before the Statute of 25 *E.* 3. it's vouched by *Sbard* in 40. Aſſize *pl.* 24 See *Calvin*'s Caſe, 7 Report.

XII.

XII. In *France* the Kings may there Denizzee, ſo likewiſe here in *England*, but with this Difference, the Letters of Denization by thoſe of *France* remove the total Diſability and Incapacity of the Alien:

Vide 1 *Inſt.* 129. a. The Difference between Naturalization and Denization.

But in *England* the Charter of Donation or Denization is but a temporary, partial, and imperfect *Amotion* of the Diſability of an Alien; for though it puts the Perſon indenized, as to ſome Purpoſes, in the Condition of a Subject, and enables a *Tranſmiſſion* hereditary to his Children, born after the Denization, yet it does not *wholly* remove the *Diſeaſe* or *Nonability*, as to the Points of *Deſcent* or *hereditary Tranſmiſſion*, and reſembles a Perſon in caſe of an *Attainder*; and therefore if he purchaſes Lands and dies without Iſſue, the Lord by Eſcheat ſhall have the Lands.

Co. 1 *Inſt.* *fol.* 2.

And therefore in lineal Deſcents, if there be a Grandfather natural born Subject, Father an Alien, Son natural born Subject, the Father is made Denizen, he ſhall not inherit the Grandfather; and if the Father dies in the Life of the Grandfather, the Grand-child (though born after the Denization) ſhall not inherit the Grandfather, for the Denization does not remove, neither the perſonal, nor the conſequential Impediment, or Incapacity of the Father.

Godfry and *Dixon's* Caſe *Godbolt*. 175. *Dyer* 44. 1 *Inſt*. 31. b.

So likewiſe in collateral Deſcents; as for Inſtance, the Father a natural born Subject, had Iſſue two Sons Aliens, who are both made Denizens, and one dies, the other ſhall not inherit him.

XIII. The like Law in Dower, a Man ſeized of Lands in Fee, takes an Alien to Wife, and then dies, the Wife ſhall not be endowed: But if the King takes an Alien to Wife, and dies, his Widow Queen ſhall be endowed by the Law of the Crown. *Edmund*, Brother of King *Edward* the Firſt, married the Queen of *Navar*, and died, and it was reſolved by all the Judges, That ſhe ſhould be endowed of the third Part of all the Lands whereof her Husband was ſeized in Fee.

26 *Ed.* 1. *Rot. part* 1.

A *Jew* born in *England*, takes to Wife a *Jew* born alſo in *England*, the Husband is converted to the Chriſtian Faith, purchaſes Lands, and enfeoffeth another, and dieth; the Wife brought a Writ of Dower, and was barred of her Dower. *Quia vero contra juſtitiam eſt quod ipſa dotem petat, vel habeat de tenemento quod fuit viri ſui ex quo in converſione ſua noluit ei adhærere, & cum eo convertere.*

1 *Inſt*. 31. b. 32. a.

Clauſ. H. 3. *M. m.* 17. *D. rſ.*

XIV.

XIV. If an Alien be a Diſſeiſor, and obtains Letters of Denization, and then the Diſſeiſor releaſe unto him, the King ſhall not have the Land; for the Releaſe hath altered the Eſtate, and it is as it were a new Purchaſe; otherwiſe it is, if the Alien had been Feoffee of the Diſſeiſee. C. 1 *Inſt. fol.* 278. B.

And though Aliens are enabled by Charter of Denization to a Tranſmiſſion hereditary to their Poſterity of Lands, yet a Denizen is not capable of *Honour*, nor to a Tranſmiſſion of the ſame, without *Naturalization by Parliament*; for by the Charter of Denization he is made, *quaſi, ſeu tanquam ligeus*; but to be a Member of Parliament, he muſt be *ligeus revera, & non quaſi*, for by his becoming a Nobleman, he claims the Place of Judicature in Parliament, the which he cannot till naturalized by Act of Parliament, and then he may claim as eligible to the ſame, or any other: And the ſame Law is at this Day in *France*, where no Foreigner can hold any Honour or Dignity in the State or any Part of the Government. 'Tis true, Cardinal *Mazarine*, who was an *Italian*, held a great Share in the ſame, but it was *vi, & manu forti*, and was the Occaſion of introducing a Civil War in that Kingdom; and yet the late Duke of *Richmond* claimed the Honour or Dignity of a Peer of *France*, as Lord of *Aubigny*, but that was a Title rather annexed to the Tenure of that Seigniory than otherwiſe. Co. 4. *Inſtit. fol.* 4. Decreed in the grand Eſtate of *Paris*, 1607. *V. de Monmouth* Hiſt. of *France*, *f.* 15.

And though his Majeſty has been pleaſed to confer the Dignity of Dutcheſs of *Portſmouth* on the Lady *Querouaille*, yet the ſame is rather Honorary than a Title conſiſtent with the Laws of *England*: For though his Majeſty is the Fountain of Honour, and may call the meaneſt of his Subjects to the higheſt of Dignities, yet it is their Civil Qualifications which make them capable of enjoying the Immunities and Priviledges of Peers; but that flows from another Fountain, even the Law of the Realm, which as to Denizens diſable them to take ſo ſignal a Mark of Sovereignty without Act of Parliament.

CHAP.

CHAP. IV.

Of Aliens, and Tryals per Medietatem, where allowed, and where not.

I. *Of the manner of Aliens obtaining Trials* per Medietatem, *at the Common Law, and of the Antiquity of the ſame.*
II. *Of the making the ſame a Law univerſal within this Realm, as to ſome Perſons, afterwards general, as to all.*
III. *Of the Writ and ſome Obſervations on the Summons of ſuch an Inqueſt.*
IV. *Of the Opportunity loſt or gained by praying this Immunity.*
V. *Of the awarding of Tales upon Requeſt on ſuch Enquiries.*
VI. *Where this Immunity does not extend to Aliens, and where it does in Matters Civil and Criminal.*
VII. *Of the Validity of a Witneſs Alien, and of an Infidel.*
VIII. *The Title of a Renegadoe.*
IX. *Of the Benefit of the King's Pardon, whether it extends to an Alien, whoſe Abode is here, but happens to be abſent at the Time of the promulgating.*

I. TRIATIO *bilinguis* or *per medietatem linguæ*, by the *Common Law* was wont to be obtained by *Grant* of the King, made to any Company of Strangers, as to the Society of *Lombards* or *Almaignes*, or to any other *Corporation* or *Company*; when any of them were impleaded, the Moiety of the Inqueſt ſhould be of their own Tongue; this Trial *per medietatem* in *England* is of great Antiquity, for in ſome Caſes Trials *per medietatem* was before the Conqueſt, *Viri duodeni Jure Conſulti, Angliæ ſex, Walliæ totidem, Anglis & Wallis jus dicunto*, and as the Commentator obſerves, it was called *Duodecim virile Judicium.*

Stanf. Pl. Coron. lib. 3 *cap.* 7.

Lamb. fol. 91.

Co. 1. *Inſt.* 155. b.

II. This Immunity afterwards being found commodious to us *Iſlanders*, became univerſal; for by the *Statute* of 27 *E.* 3. *cap.* 8, it was enacted, that in Pleas before the *Major of the Staple*, if both Parties were *Strangers*, the Trial ſhould be by *Strangers*; but if one Party was a *Stranger*, and the other a *Denizen*, then the Trial ſhould be *per medietatem Linguæ*: But this Statute extended but to a narrow Compaſs, *viz.* only where both Parties were *Merchants* or *Miniſters of the Staple*, and the Pleas before the *Major of the Staple*: But afterwards in the twenty-eighth Year of the ſame King's Reign it was enacted, That all

27 E. 3. *cap.* 18.

28 *E.* 3. *c.* 13.

manner

manner of Inqueſts, which was to be taken or made amongſt Aliens & Denizens, be they Merchants, or others, as well before the Mayor of the Staple, as before any other Juſtices or Miniſters: Although the King be Party, the one half of the Inqueſt or Proof ſhall be *Denizens*, the other half *Aliens*, if ſo many Aliens and Foreigners be in the Town or Place where ſuch Inqueſt or Proof is to be taken, that be not Parties, nor with the Parties in Contract, in Plea, or other Quarrel, whereof ſuch Inqueſt or Proof ought to be taken; and if there be not *ſo many* Aliens, then ſhall there be put in ſuch Inqueſts or Proofs *as many* Aliens as ſhall be *found* in the ſame Town or Places, which be not thereto Parties, as aforeſaid; and the Remnant of Denizens, which be good Men, and not ſuſpicious to one Party or other.

By which *Statute* the ſame Cuſtom or Immunity was made a Law Univerſal, although it be in the Caſe of the King, for the Alien ſhall have his Trial *per medietatem*. But if it be for Treaſon, è contra. Vide poſtea Num. 5.

It matters not whether the Moiety of Aliens be of the ſame Country, as the Alien Party to the Action is; for he may be a *Dutch Man*, and they *Spaniards*, *French Walloons*, &c. becauſe the Statute ſpeaks generally of *Aliens*. *Dyer* 144.

III. The Form of the *Venire facias* in this Caſe, is, *De Vicineto*, &c. *quorum una medietas ſit de Indigenes, & altera medietas ſit de alienigenis natis*, &c. And the Sheriff ought to return *twelve Aliens* and *twelve Denizens*, one by the other, with addition which of them are Aliens, and ſo they are to be ſworn; but if this Order be not obſerved, it is holden as a miſreturn. *Cro. Eliz.* 818. 841. *Bro. tit.* Trials

It has been conceived of ſome, that it is not proper to call it a Trial *per medietatem Linguæ*, becauſe any Alien of any Tongue may ſerve; but that ſurely is no Objection, for People are diſtinguiſhed by their Language, and *Medietas Linguæ* is as much as to ſay, half *Engliſh*, and half of any other *Tongue* or *Nation* whatſoever; nor matters it of what *ſufficiency* the Jurors are, for the Form of the *Venire facias* ſhall not be altered, but the Clauſe of *quorum quilibet habeat* 4. *l.* &c. ſhall be in. *Cro. El.* 841

If *both Parties* are *Aliens*, then the Inqueſt ſhall be *all Engliſh*; for though the *Engliſh* may be ſuppoſed to favour themſelves more than *Strangers*, yet when both Parties 21 *H.* 6. 4.

are *Aliens*, it will be preſumed they will favour both alike, without any *Difference*.

2 *Ro. Abr.* 643. Where an Iſſue is joined between a Denizen and an Alien, and a *Venire facias* awarded *per Medietatem Linguæ*; and the Sheriff returns 12 Denizens and 12 others for Aliens, whereas in Truth there are not 12 Aliens nor 6 Aliens returned: In this Caſe it ſeems that the Alien may challenge the Array, for otherwiſe he hath no Remedy, if he ſhall be concluded by the Sheriffs Return.

Dy. 28. 1. *in Margine.* But if he doth not challenge, and ſo they are impanelled, &c. it is ſufficient; yet if eight Denizens and four Aliens are impanelled it is ill, becauſe it appears in this Caſe that the Trial is not *per Medietatem*.

Cro. El. 293. If a Writ of Inquiry of Damages be awarded in an Action between a Denizen and an Alien, the Inqueſt ſhall be all of *Engliſh*, and not Part of *Aliens* for it is out of the Statute.

Dyer 28. a. IV. If an *Alien* is party, who ſlips his Opportunity, and ſuffers a Trial by all *Engliſh*, the Judgment is not *Erroneous*; for if he will be ſo negligent as to ſlip that Advantage which the Law gives him, it is his Fault; (*a*) for the Alien, if he will have the Benefit of that Law, muſt pray a *Venire facias per Medietatem Linguæ, at the Time of the awarding the Venire facias*: But if a neglect of that Opportunity happens, yet if he prays it after the awarding a general *Venire facias*, the ſame may be retrieved, ſo as it be before the *Venire* be returned and filed, for then he may have *Venire facias de novo*, or otherwiſe he cannot, (*b*) nor can he afterwards challenge the *Array* for this Cauſe, if it falls out the Juries are all *Denizens*; though *Stamford* ſeems to be of a contrary Opinion, for the Alien muſt pray it at his Peril, *Heyward* againſt *Lipſon*.

(*a*) *Dy.* 144. *pl.* 60.

21 *H.* 7. 32.

(*b*) *Pl. Coron* 150. *Dyer* 357. 2 *Ro. A.* 643. *Cro. El.* 562. 3 *E.* 4. 11, 12.

V. If there be a general *Venire facias*, the Defendant cannot pray a *decem Tales*, &c. *per Medietatem Linguæ* upon this, becauſe the *Tales* ought to purſue the *Venire facias*: But if the *Venire facias* be *per Medietatem Linguæ*, the *Tales* ought to be *per Medietatem Linguæ*, as if five Aliens and five Denizens appear on the principal Jury, the Plaintiff may have a *Tales per Medietatem*; but if the *Tales* be general *de circumſtantibus*, it hath been held good enough, for there being no Exception taken by the Defendant upon the *awarding* thereof, it ſhall be intended well awarded.

10 *Co.* 104. a.

Cro. El. 818, 841.

If

If an *Alien* that *lives* here under the Protection of the *King* of *England*, and Amity being between both Kings, commits *Treaſon*, he ſhall by Force of the Act of 1 and 2 *Philip* and *Mary*, be tried according to the due Courſe of the *Common Law*, and ſhall not in that Caſe be tried *per medietatem Linguæ*.

21 *H.* 4. *Stamford* 154. *Hill.* 36. *Eliz.* Dr. *Lopez*'s Caſe by all the Judges.

But in the Caſe of *Petit Treaſon*, *Murder*, *Felony*, &c. if he prays his Tryal *per medietatem Linguæ*, the Court ought to grant it.

Dyer 144. Caſe of *Sherley* where the Point is fully handled, *Co. Inſtit.* 3. *part. fol.* 27.

Yet if an *Information* be exhibited againſt an *Alien*, and an *Engliſhman*, the Tryal is not *per medietatem*, but according to the *Common Law*.

Moore 57. *Barr*'s Caſe.

If an *Alien in League* bring an Action (if there be Cauſe) the Defendant may plead in Abatemeut; but if it be an *Alien Enemy* he may conclude in the Action.

Colivre Coke's Entries, *tit.* Alien 1. *Stam.* 160. *B.*

In an Action for Words the Defendant pleaded Not Guilty, and ſaid he was an Alien born, and prayed Tryal *per medietatem Linguæ*, which was granted, and at the *niſi prius* in *London*, but ſix *Engliſhmen* and five Aliens appeared, and the Plaintiff prayed a *Tales de Circumſtantibus per medietatem Linguæ*, and it was granted, ſo there wanted one Alien, and the Record was:

27 *Ed.* 3. *c.* 8. 28 *Ed.* 3. 13. 2 *H.* 5. 3. *Dy.* 28. *a. in Margine.*

Ideo alius Alienigena de Circumſtantibus per Vic. London, *ad requiſitionem infra nominati* Julii Cæſaris, *per mandatum Juſticiariorum de novo appoſito, cujus nomen pannello prædict. affilatur, ſecundum formam Statuti in hujuſmodi caſu nuper editi & proviſi; qui quidem Jurator ſic de novo appoſitus,* viz. Chriſtianus Dethick *Alienigena exactus venit, ac in Juratam illam ſimul cum aliis Juratoribus prædict. prius impanellatis & juratis juratus fuit*, &c. It was found for the Plaintiff, and afterwards moved in Arreſt of Judgment, That no *Tales* was to be granted *de Circumſtantibus*, when the Tryal is *per medietatem Linguæ*, by the Juſtices of *Niſi prius*, by the Act of 35 *H.* 8. becauſe in the Act it is ſpoken of Freehold of Jurors, and an Alien is not properly ſaid of any Country, or to have any Freehold; but it was adjudged becauſe the Statute was made for ſpeedy Execution, that it ſhould be expounded favourably, according to the Intent and Meaning of the Makers of the Act; and though in this Caſe the *Tales* was prayed by the Plaintiff, where it ought

10 *Co.* 104. 2.

Mich. 35, 36. *Eliz. in B. R.* Sir *Julius Cæſar verſus Philip Curſeny*, *Cr. Eliz.* 305.

ought to have been *ad requiſitionem Defendentis*, yet that ſhould be taken to be but a Miſpriſion, and would be amended.

Dy. 28. a Margine. Cro. El. 275.

VI. If the Plaintiff or Defendant be *Executor* or *Adminiſtrator*, though he be an *Alien*, yet the Tryal ſhall be by *Engliſh*, becauſe he ſueth in Auter droit; but if it be averred, that the *Teſtator* or Inteſtate was an *Alien*, then it ſhall be *per medietatem Linguæ*.

Sherley a *Frenchman*, who joined with *Stafford* in the Rebellion, in taking of *Scarborough Caſtle* in the County of *York*, he being taken, was arraigned in the King's Bench upon an Indictment of *Treaſon*, and the Indictment was

7 Co. 6. b.

contra legiantiam ſuam debitam; and the Indictment was ruled to be good, although he was no Subject, becauſe it was in the Time of Peace between the *Queen* and the *French King*. But if it had been in the Time of *War*, then the Party ſhould not have been *indicted*, but *ranſomed*. It was likewiſe ruled there, that the Tryal was good, although the *Venire facias* awarded in *York* was general, and not *de medietate Linguæ*; for ſuch Tryal *per medietatem Linguæ* does not extend to *Treaſons*, and the Indictment ought to omit the Words, *Naturalem Dominam ſuam*, and begin that he intended Treaſon *contra Dominam Reginam*, &c. *Hill.* 36 *Eliz. in B.R. Stephano Ferrara de Gama*'s Caſe in Dr. *Lopez*'s Treaſon.

Dyer. 145. Hob. 271. Salk. 633.

7 Co. 6. b.

If an *Alien Enemy* come into this Realm, and be taken in *War*, he cannot be indicted of *Treaſon*, for the Indictment cannot conclude *contra legiantiam ſuam debitam*, for he never was in the Protection of the King; and therefore he ſhall ſuffer Death by *Martial Law*, and ſo it was ruled in 13 *H.* 7. in *Perkin Warbeck*'s Caſe, who being an Alien born in *Flanders*, feigned himſelf to be one of the Sons of King *Edward* the Fourth, and invaded the Realm, with intent to take upon him the Dignity; who had his Judgment and Tryal by *Martial Law*, and not by the *Common Law* of *England*.

Sir *John Davies*'s Conqueſt of *Ireland*, fol. 103, 104, 105.

VII. The Kingdom of *Ireland* was a Dominion ſeparated and divided from *England* at the firſt, and came to the Crown of *England* by *Conqueſt*, in the Time of *Henry* the Second; and the meer *Iriſh* were as *Aliens*, *Enemies* to the Crown of *England*, and were diſabled to bring any Action, and were out of the Protection of the Laws of this

Realm;

Realm; and five *Scepts* of the *Iriſh* Nation were only enabled to the Laws of *England*, *viz. Oneil de Ultonia*, *O Mollogblin de Media*, *O Connogbor de Connacia*, *O Brian de Tbolmonio*, and *Mac Morougb de Lagenia*, as appears by the Records of the Dominion of *Ireland*, and ſeveral Grants have been made to the *Iriſh*, which proves them to be mere Aliens. But afterwards, though the ſame was a ſeparate and divided Kingdom, yet whilſt they were under the Subjection and Obedience of the Kings of *England*, if *High Treaſon* had been committed by an *Iriſhman*, he might be arraigned, indicted, and tried for the ſame within *England*, and by the *Laws* of *England*; and ſo it was reſolved by all the Judges of *England* in *Orurke*'s Caſe, 33 *Eliz.* and alſo in Sir *John Perrot*'s Caſe, that *Ireland* was out of *England*, and yet that all *Treaſons* committed there, were to be tried in *England*, and that by virtue of the Statute of 38 *H.* 8. *cap.* 23. *Artbur Crobagen*, an *Iriſhman*, was arraigned, for that he being the King's Subject, at *Lisbon* in *Spain* uſed theſe Words, *I will kill the King (inuendo Dominum Carolum Regem Angliæ) if I may come unto him*, *becauſe he is a Heretick*; that afterwards he came into *England*, and was taken, and tried by a Jury of *Middleſex*, and was found guilty; and it was held High Treaſon by the Courſe of the *Common Law*, for his traiterous Intent, and Imagination of his Heart is declared by theſe Words, and within the Statute of 25 *E.* 3. he confeſſed he was a *Dominican Fryer*, and Prieſt in *Spain*.

Co. 7. *fol.* 23. *Calvin*'s Caſe.

Cro.Car. 333.

Bracton ſays, that an Alien born cannot be a Witneſs; but that is to be underſtood of an *Alien Infidel*; for the Biſhop of *Roſſe*, being an Alien born (a *Scot*) was admitted to be a Witneſs, and *ſworn*.

14 *Eliz.* in the Caſe of the Duke of *Norfolk*, *Co.Inſtit.* 4 *pt. fol.* 279.

Yet an *Infidel* may bring an Action againſt another Merchant, or any other however *, and that without Controverſy.

* 11 *H.* 8. *fol.* 4.

VIII. The Teſtimony of a *Renegadoe* is not to be received at this Day, by the Laws of any *Chriſtian Kingdom* or *Republick*; he that hath once renounced his *Faith* can never be believed, therefore he cannot be a Witneſs; and ſo it was ruled where one *Domingo de la Cardre*, a *Renegadoe*, who was ſworn, and gave Evidence; afterwards a new Tryal being granted, his Teſtimony was rejected, and he not ſuffered to be ſworn, it being at his Tryal proved, that

Hill. 17, 18. *Car.*2. *in B.R. Robles verſus Langſton.*

that he was a *Spaniard, and a Chriſtian by Birth and Education, and after became a Jew.*

Hobart, fol. 271. Courten's Caſe.

IX. If an *Alien be Reſident*, and commits an Offence, he ſhall have the Benefit of the King's *general Pardon*; but if he is *not in the Kingdom* at the Time of the Pardon promulgated, then he loſes the Benefit of the ſame; for he is no otherwiſe a Subject, *but by his Reſidence here.*

CHAP. V.

Of Planters.

I. *Of Poſſeſſion and its Original Right.*
II. *Of Vacancies natural, which give a Right to Planters.*
III. *Of Civil Vacancies, how far the ſame might be poſſeſſed.*
IV. *Of Perſons expelled, whether juſt to deny ſuch to plant in Places vacant.*
V. *Of Planters, whether they have a firm Right, ſo as to diſpoſe by Will, or only a Uſufructuary Poſſeſſion.*
VI. *Of Planters, wanting Things neceſſary for the Support of human Life, generally conſidered according to the Laws of Nature.*
VII. *Wherefore one Man may naturally have more than another, and what Conditions are annexed to ſuch Fortunes, for thoſe that are in Neceſſity.*
VIII. *Whence it is, that there was at the Beginning, and is ſtill a tacit Condition of re-aſſuming our original Rights, in caſe of extreme or natural Neceſſity for natural Community.*
IX. *Of Neceſſity conſidered in a Chriſtian Community.*
X. *Of the Primitive Communion, conſidered in reference to its Reſtrictions and Limitations.*
XI. *Of thoſe things that are dedicated to God, and holy Uſe, whether ſubject to the Relief of our Neceſſity.*

Aſcham. fol. 15.

I. HAVING in the firſt Chapter of this Work diſcourſed of the Original of Property, deducing its Inception to that which we call Poſſeſſion or *Meum*, and how the ſame may be altered by War, it may not ſeem unneceſſary to diſcourſe of the acquiring of Property in the new Diſcoveries of thoſe vaſt Immenſities of *America*, which being prepoſſeſſed, ſeem to deny us legally that Title which we pretend to.

Poſſeſſion by Law is eſteemed the higheſt Title that Men can pretend to what they enjoy, which is nothing elſe but *poſitio pedis*; as if the Ancients had no other Seal to confirm their Tenures, but the Prints of their Feet: And good Reaſon,

Reaſon, ſeeing the Mind is not able to take up a Place ſo well as the Body; for many Men's Wills may concur in (wiſhing and liking) the ſame thing, but many Bodies cannot concur to the poſſeſſing it: Beſides the Mind cannot ſet an outward Mark on what it likes, that thereby others might be warned to abſtain from it, all which the Body properly doth. *Abraham* and *Lot* going to plant, declared no more than this, *there was Room or Vacancy enough*; and therefore, without further Examination or Scruple, they knew they might turn to the right Hand or to the left, to poſſeſs what they would to themſelves.

II. This Vacancy, which gives us a right to plant, is to be conſidered in two Reſpects; 1. Natural: 2. Civil: The firſt is in things which may be poſſeſſed, but actually are not, neither in Property nor Uſe; ſuch a Vacancy which is *nullius in bonis*, might be occupied by *Switzers*, who, as *Cæſar* ſaith, would fain have changed their rough Hills for ſome near *Campania*; and Deſarts or Places uninhabited may be poſſeſſed and appropriated to the firſt Planter, and that without all Controverſy, but eſpecially by thoſe who being expulſed from their own Seats or Eſtate, ſeek Entertainment abroad: The *Anſebarians* in *Tacitus*, cry out, *As the Heaven to the Gods, ſo is the Earth granted to Mortals, and what is void is publick:* Looking up to the Sun and Stars, they did openly as it were inquire of them, *Whether they were pleaſed in beholding any Ground empty, and without Inhabitants, they ſhould rather caſt forth the Sea, and overwhelm the Spoilers of the Earth.*

Tacit. Annal. 13.

III. Civil Vacancy is where it is not abſolutely incorporated, as among the roving *Arabians* and *Moors* in *Barbary*, and other *Africans* and *Americans*, who poſſeſs one Place to Day, and another to morrow; theſe by their frequent Returns ſhew, that they abandon not the Places they remove from, as *derelicta quæ quis in bonis amplius numerare non vult*; we cannot ſay, that their natural or voluptuary Intereſt in them is no way improved; for *Grotius* ſeems to be of Opinion, * that if there be ſome Deſert or barren Ground, the ſame ought to be granted to Strangers upon their Requeſt, and, ſays he, *It is alſo rightly ſeized on by them*, giving this Reaſon, *For that Lands ought not to be eſteemed occupied which are not cultivated*; *but only as to the Empire, which remains intire to the firſt People*, they do no Offence who

Ubi nec poſſeſſo eſt plene in homine, nec homo plene in poſſeſſione.

* *De Jure Belli ac Pacis lib.* 2. *cap.* 2. § .17.

who inhabit, and manure a Part of the Land that lies neglected †.

† *Dion. Pruſæenſes, Orat.* 5.

But we muſt preſs this Argument of *Grotius* very tenderly, leſt by the ſame Reaſon others conclude, that thoſe Eſtates which are not competently improved, are derelict and occupiable by others, which would introduce perpetual Confuſions, and eaſily perſuade every Man that he could huſband his Neighbour's Lands better than himſelf: However, this is a clear Caſe for all Planters, that thoſe Waſtes, or *aſperi montes*, which the Natives make no uſe of, nor can receive any Damage by their being poſſeſſed by others, may lawfully be impropriated by them.

Rectè facta eſt conceſſio, quæ eſt ſine damno alterius.

IV. Again, if a Nation or People expelled their own Country, ſhould deſire to ſeek void Places, or at leaſt ſuch as might not abſolutely endamage a People into whoſe Territory they come, they may juſtly plant; the Reaſon is, for that Dominion or Property might be introduced with a Reception of ſuch Uſe which profits * ſuch diſtreſſed People, and hurts not thoſe; and therefore the Authors of Dominion are ſuppoſed willing rather to have it ſo; but to give away that which we have but a bare Right to, and no Poſſeſſion, can neither be juſt in the Giver, nor lawful in the Receiver. We have an eminent Example of this amongſt the *Turks*; for the *Tartars* having over-run the North of *Aſia*, and many Nations, fled from their own Countries for fear of them, amongſt other the *Coraſines*, a warlike People, being thus unkennelled, they had their Recourſe to the *Sultan* of *Babylon*, and petitioned him to beſtow ſome Habitation upon them; their Suit, according to the Rules of Policy, he could neither ſafely grant nor deny; to admit them to be Joint-tenants in the ſame Country with the poſſeſſed *Turk* would turn to a preſent Inconvenience and a future Miſchief, and to deny them, might perhaps edge their Diſcontents into Deſperateneſs; therefore inſtead of giving them Gold, he ſent them to the Mines, yet ſo as they took it as a very great Courteſy; for he beſtowed on them all the Lands which the Chriſtians held in *Paleſtine*, liberally to give away what was none of his, and what the others muſt purchaſe before they could enjoy: Sad was the Donation; for by virtue of that Conveyance they became Conquerors of *Jeruſalem*, and of the whole Strength of the Chriſtians.

Bald. 3. *Conſ.* 293.

* *Serv. ad* 7. *Æn. Littuſq; rogamus innocuum, cujus vindicatio*, ait, *nulli poſſit nocere.*

Matthew Paris, fol. 851.

Matthew Paris, fol. 834, 835.

V. But admitting that Planters may appropriate a Plantation for their Living, whether ſuch may diſpoſe of the ſame by Will (we ſuppoſing the Poſſeſſor having no Heir) for that he might ſeem to have but an uſufructuary Poſſeſſion, till a Deſcent had been caſt, which then perhaps may turn the ſame into a Right: † Without all Controverſy the very immediate poſſeſſing and planting creates a right againſt all, but he that hath Empire there, and that very right, the Party in his Life-time might have actually transferred over to another. Now though the Deviſe in the Will operates not till after his Death, yet the Gift is made during his Life; according as the *French* have it, *Se deſpouiller avant que s'en aller coucher*, that is, Man firſt puts off his Cloaths, and then goes to Bed.

† As it is conſonant to Nature that my Share of Subſiſtence, which was before uncertain, ſhould now be fixed, ſo it is neceſſary, that the Conſent which others gave to this at firſt ſhould ſtand fixed, eſpecially if there was no Obligation or Declaration at the firſt to the contrary. *Vide Selden de Jure Nat. & Gen. ad men. Heb. id. obligat. quod eſt ex officio quod legis eſt*: But the Sanction of a Law ſuppoſes the Nullity of a State of Nature, not of a Right of Nature.

VI. Again, Perſons having arrived in thoſe Territories, and planted, but before they have reapt the Fruits of their Labour, Neceſſity is found within their Huts, and a Supply of Things for the Support of human Life is wanting, whether ſuch may ſeek the Means of Subſiſtence by the Laws of Nature, and in caſe of Refuſal (after Requeſt) force them from their Neighbour Planter? Surely that which is neceſſary for my natural Subſiſtence, and not neceſſary to another, belongs juſtly to me, unleſs I have merited to loſe the Life which I ſeek to preſerve. There were a Defect in God's creating our Natures, ſuch as they are, if he did not provide Means to uphold their Beings, according to the natural Faculties which he hath given them. A good Mother divides her Bread among her Children, ſo as a Morſel may come to each; let us therefore judge this Caſe by thoſe Rules of Juſtice, by which we judge other Caſes: If a Father in his Will paſs by a Child, or names him, but upon falſe Cauſes leaves him nothing, he is notwithſtanding by the Equity of the *Civil Law* admitted to a Child's Part, as *legitimate*, and may form his Action *contra Teſtamentum inofficioſum*. Men are all akin, and we derive one from another, and to let others ſettle in our Places, who may juſtly expect as much due to them, for their natural Subſiſtence,

Pia mater panem inter liberos diſtribuit, ut fructus veniat ſingulis.

as

as was to thoſe who before went out of the World, to make place for them, yea though they aſſign them nothing at their Departure.

Man were of all living Creatures moſt miſerable, if he might not during this Life have that Meaſure, which God would not have an Ox defrauded of; thus hath every Dunghil-Fly a Right to live, and to remain infectile, which beſides Exiſtence hath Senſe, and may not juſtly be depriv-ed of that its chiefeſt Felicity, unleſs it be importunate to a nobler Creature.

VII. 'Tis very true, that no Man can pretend to ſhare in the Sweat of another Man's Brows, or that the Pains, and waſting of another Man's Life, ſhould be for the Maintenance of any but his own; nay, though it be granted, that thoſe Neighbour-planters, who being ſettled before us, and having acquired either by Induſtry, or lawful Donation, the Fruits of other Men's Labours, and conſequently muſt enjoy more Plenty than a new Comer or Planter, yet all that they poſſeſs is not properly theirs; for if another by extreme Neceſſity be periſhing, and they have above what they can conſume in a natural way, then they have no fuller a Property in that Plenty than Stewards have, and for this Regard they are ſo called in Scripture: *The Earth ſtill is the Lord's, and the Fulneſs of it is his, for he made it of his own Matter, and for the Faſhion of it uſed not our Aid; yea, it is his Sun which ſtill produces, and his Clouds which drop Fatneſs:* We can only pretend the Contribution of a little Pains for that which is our natural Share; ſo that in plain Reaſon we may not expect to be otherwiſe qualified than Stewards, for all that which is not probably neceſſary for our own Subſiſtence, or for theirs, who ſubſiſt only by us: Wherefore if *Lazarus* ready to periſh (not by Fault, but by Misfortune) had taken *Dives* his Crumbs, contrary to his Will; yet he had ſinned no more than he who takes ſomething which the Lord or Maſter hath given him, tho' the Steward contradict it: But if it ſo happen, that both the Planters are *in pari neceſſitate*, then *melior eſt conditio poſſidentis*; or, as St. *Paul*'s Words are, when he excited the Churches Charity and Alms, for the Relief of the diſtreſſed Members of Chriſt, *Not* (quoth he) *that other Men be eaſed, and you burdened.*

Xenophon in the Anſwer to the *Cynopenſes*: *Ubi jus emendi nobis non conceditur ſive in Barbarico, ſive in Græcanio ſolo ubi quæ opus ſummus, non per vim, ſed ex neceſſitate. Exped. Cyri.*

Leſſius, lib. 2. *cap.* 12. *dub.* 12. *num.* 70

2 Cor. 8. 13.

VIII.

VIII. The Will of thoſe who firſt conſented mutually to divide the Earth into particular Poſſeſſions, was certainly ſuch as receded as little as might be, from natural Equity; for written Laws are, as near as poſſible, to be interpreted by that; and therefore in Caſes of ſuch Extremities we are not without Examples, of taking the Goods of one to ſupply the Neceſſities of many: And therefore at Sea, if Proviſions begin to fail in a Ship, every one may be forced to bring out openly, what he laid in for his Paſſage in particular; ſo a Ship at Sea, having in Streſs of Weather, ſpent her Sails, Cordage, and Anchors, meeting other Veſſels at Sea, may take a Supply of ſuch as ſhall be wanting; but yet governed according to St. *Paul*'s Words, *So that ſuch taking ſtraitens not the other Ship*. So when the Sea breaks in upon a Country, we may dig in the next Man's Grounds to make a Bank, without ſtaying for the Owner's Permiſſion, yea, tear down any Man's Hedge, or Fence, when the common Paſſage is ſtopped: For in ſuch caſes of Neceſſity human Laws (as is mentioned afore) do not ſo much permit as expound their natural Equity, and that which Men give to thoſe who are ſo innocently diſtreſſed, who borrow Life only from the Shadows of Death; *Et picta ſe tempeſtate tuentur*, is not ſo properly a Charity to them as a Duty; and if he be a Chriſtian that gives, perhaps he doth more Charity to himſelf than to the Receiver.

Grotius de Jure Belli ac Pacis, lib. 2. cap. 2. §. 7, 8, 9.

Leges humanæ obligant uti factæ ſunt, ſcilicet cum ſenſu humanæ imbecillitatis.

IX. The Reaſon of this Chriſtian Charity or Communion is as far above the natural, as Chriſt himſelf was above Nature; this requires an equal Beating of all Pulſes, that as Fellow-Members we have a *homogeneal* Senſe and Palpitation; we are to divide a Cruſe of Oil, and a few Handfuls of Meal, with one of Chriſt's Flock, with an abandoned Creature; and what can be in more Extremity than a poor Planter in a ſtrange Place, deſtitute for the preſent Supports of human Life?

Nequicquam fundo ſuſpiret nummus in imo.

And ſurely the Violation of this *Jus Charitatis* is no leſs than Theft in thoſe, who having extended Fortunes, never defalcate a *Gibeonite*'s Cruſt perhaps for a wandering Angel; theſe ſteal even the ſhipwrack'd Man's Picture from him, which as his whole Inheritance he carried at his Back, to move Compaſſion, and by the inſatiable Sea of their Avarice and Luxury, they wreck him over at Land.

X.

X. But this free primitive Communion had, and hath its Bounds, and its *quantum* in Contributions, as well as the natural; otherwiſe it might be fraudulent, and thieving: For they who poſſeſs but a little, would contribute it all, on purpoſe to ſhare equally with thoſe who poſſeſs very much, which would introduce a viſible Decay and Ruin in all; as *Tiberius* rightly obſerved * on *M. Hortalus* his petitioning an Alms for *Auguſtus Cæſar*'s Sake, *Idleneſs would increaſe, and Induſtry languiſh, if Men ſhould entertain no Hope nor Fear to themſelves, but ſecurely expect other Men's Relief, idle to themſelves, and burdenſome to us?*

* *Intenditur inquit ſocordia langueſcet induſtria, ſi nullus ex ſe metus aut ſpes, & ſecuri omnes aliena ſubſidia expectabunt, ſibi ignavi, & nobis graves.* Tacit.

Wherefore in the midſt of that primitive Communion, we find that the Apoſtles went *domatim*, from Houſe to Houſe breaking of Bread, therefore they even then retained by their Houſes in Property; which Property is ſuppoſed by the eighth Commandment, as well as it is by Chriſtian Charity: For no Man can ſteal, but by invading the Right of another; and as for Charity, it is neceſſary he have ſomething of his own, to be able to fulfil its Commands, and to make a Dole at his Door; and it is very convenient that he give it rather with his own Hand, than by ſome publick Collectors, *For Charity is heated moſt with the Senſe of its own Action.* Moreover under the Law, Jews were commanded *to love one another as themſelves*; yet this Command took not away Property then, therefore it takes it not away now, notwithſtanding we owe the Uſe or Uſufruct of our Properties to the diſtreſſed, though ourſelves be at the ſame time in Diſtreſs; juſt as we are commanded, by the Peril of our own Lives, to endeavour to ſecure our Neighbours Life, which is yet a Charity more tranſcendent than the other, by how much Life is above a Livelihood. And though the various Laws of Countries have variouſly provided Puniſhment for thoſe, who out of meer Neceſſity take ſomething out of another's Plenty; yet that proves not the Act to be Sin, or repugnant to Equity or Conſcience, but rather repugnant to the Convenience of that Kingdom or Republick where the Act is committed; and the true Reaſon of the ſame is, leſt thereby a Gap might be laid open to Libertiniſm; beſides, Reaſon of State, we know, conſiders not Virtue ſo much as publick Quiet and Conveniency, or that Right which is *ad alterum*.

Mat. 7. 11.

XI.

XI. We will now conſider thoſe things which are God's, which yet are not his in ſuch a ſtrict rigorous Senſe, but that they lie open to the Exceptions of our juſt Neceſſities; hence that which is devoted as a Sacrifice to him, in caſe of Neceſſity, may be made our Dinner, witneſs the Action of *David*: Wherefore the Conſequence of our Saviour's Anſwer was very ſtrong, when he defended his pulling the Ears of Corn in another's Field: That if it was lawful for *David* in his Neceſſity to eat that Bread, which was provided for the Table of God, then how much more was it lawful for him and his Apoſtles in their Neceſſities to take a refreſhing out of that which belonged to Man? By the *Canon Law*, if no other means can be found, the Veſſels of the Altar may be ſold to redeem thoſe Souls who are enthralled in Miſery and *Captivity*; and is there not good Reaſon for it, ſeeing they ſerve but for the Souls of Men, and therefore the Souls of Men are more precious than they? Yea the Sacrifice itſelf, to what End is it, but to obtain a State of Piety for us?

Decretals of *Gratian, lib. Synodus Nicaenenſis, Can. Synodus Aureliacenſis, Can. Concilium Toletanum.*

Upon what hath been ſaid, it may not ſeem an Injury, if a Planter (wanting thoſe things for the Support of human Life) requeſting a reaſonable Proportion of his Neighbour (having it to ſpare) with an Intention to repay, if denied, by force to take the ſame from him; for that Reaſon which creates a Puniſhment in a ſettled Commonwealth, for the like Actions, does in ſuch Places fail.

Grotius de Jure Belli ac Pacis, lib. 2. *cap.* 2. §. 8, 9.

CHAP.

CHAP. VI.

Of the Jews.

I. *Of Conſiderations touching their various and ſeveral Forms of Government down till their total Extirpation.*

II. *Of their firſt coming into* England, *and when.*

III. *Of their State and Condition after their inhabiting here.*

IV. *Of their Privileges and other Immunities in reference to their Monies and Charters.*

V. *Of their Cheſts and Stars, and the Manner of Proceedings for the recovering of their Debts.*

VI. *Of their Charters and Immunities, and of the Confirmation of the ſame.*

VII. *Of the Conſequences and Inconveniences that fell and were occaſioned by reaſon of their Courts, as to the Eccleſiaſtical Cognizance.*

VIII. *Of their Power in erecting of Synagogues, and of the Foundation of the Houſe of Converts, now called the Rolls.*

IX. *Of their Charter obtained of the Prieſthood of all the Jews of* England.

X. *Of Places totally exempted in* England *from their Society.*

XI. *Of the Endowment of their Wives, according to the Laws of the* Jews, *and of their Power of Excommunication of each other.*

XII. *Of the real State and Condition that they remained in, notwithſtanding all their various and ſeveral Immunities.*

XIII. *Firſt, in reference to their Perſons, being obliged to wear Badges or Tables on their Breaſts, as Notes of Diſtinction, and having entered the Realm, could not depart without Licence.*

XIV. *Secondly, as to their Eſtate, the ſame being ſolely at the Will of the King; for at their Death the ſame eſcheated; they could not ſue without Leave or Licence, the King might reſpite or releaſe the ſame, and have nothing but what was ſolely at the Devotion of the State; continued ſo till their total Baniſhment out of the Realm.*

I. SINCE the Remainder of that mighty Nation, which of old were elected a People peculiar, are now by him that firſt choſe them, diſperſed over the Face of the Earth, and are become the moſt politick of Traders now extant, having by their Induſtry cemented themſelves into the principal Revenues and Traffick of the Univerſe, but more eſpecially among thoſe Nations who remain in Darkneſs, and in the Shadows of Death. It might not ſeem improper to examine how their Condition ſtood of old in this Nation, what Advantages and Diſadvantages they brought to this Realm, and how the Laws of the ſame ſtand in reference to the People at this Day.

At

At the firſt the Fathers of their ſeveral Families, and the Firſt-born after them, exerciſed all kind of Government both Eccleſiaſtical and Civil, being both Kings and Prieſts in their own Houſes, they had Power over their own Families, to bleſs, curſe, caſt out, diſinherit, and puniſh with Death, as is apparent by *Noah* towards *Cham*, *Abraham* towards *Hagar* and *Iſmael*, *Jacob* towards *Simeon* and *Levi*, &c. In *Moſes*'s Days then did this Prerogative of Primogeniture ceaſe; and as *Aaron* and his Poſterity were inveſted with the Right and Title of Prieſts, ſo *Moſes* and *Joſhua* governed the People in a kind of Monarchical Authority.

After *Joſhua* ſucceeded *Judges*, their Office was of abſolute and independent Authority, like unto Kings when once they were elected; but there were long Vacancies and Chaſms (commonly) between the Ceſſation of the one, and the Election of the other; yea, for the moſt part they ſeldom choſe a Judge but in the Time of great Troubles and eminent Dangers, which being over-paſt, he retired to a private Life, much ſymbolizing with the *Roman* Dictators, and continued with them according to the Computation of ſome 329 Years. In the Vacancies or Diſtances of Time between Judge and Judge, the greater and weightier Matters were determined by that great Court of the Seventy called the *Sanhedrim*, in which reſpect the Form of Government may be thought Ariſtocratical; Kings ſucceeded the Judges, and they continued from *Saul* to the *Captivity*, that is, about 500 Years.

Aug. de Civit. Dei, lib. 18. *cap.* 22.

From the *Captivity* unto the coming of the *Meſſiah*, which is thought to have been 536 Years, the State of the *Jews* became very confuſed, ſometimes they were ruled by Vicegerents, who had not Supreme Authority in themſelves, but as it pleaſed the *Perſian* Monarchs to aſſign them; they were called *Heads of the Captivity*, of which was *Zorobabel* and his Succeſſors down to *Hoſodia*, which were thought to have been of the Poſterity of *David*; ſo likewiſe the other ſucceeding ten chief Governors under *Alexander the Great*, in the laſt of thoſe ten, Government departed from the Houſe of *David*, and was tranſlated to the *Maccabees*, who deſcended from the Tribe of *Levi*, and from them the Sovereign Authority continued to *Herod the Askalonite* his Reign, at which Time our Saviour Chriſt was born accord-

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Gen. 49. 10.

ing to *Jacob*'s Prophecy: *The Scepter ſhall not depart from Judah, nor a Law-giver from between his Feet, until Shiloh* (that is, the *Meſſiah) come*; which Scepter was given to *Judah*, that is, to the twelve Tribes from the Time of *Moſes*, and that it was taken fully from them in *Herod*'s Time, and given to him who was a * Proſelyte, and no ways deſcended from that holy Stock, for ſuch was *Herod.*

* A *Jew* is a Name of Profeſſion, not of Country or Nation. *Joſeph Scaliger ex quo Caſaubon, adv. Baron pag.* 19. & 39.

Their Condition ſince the Extirpation of their Commonwealth, and their diſperſing over the Face of the whole Earth, after the ſacking of their Metropolis, is fully related by *Joſephus*, *Euſebius*, and others, and what Condition, and how uſed in moſt Nations they have been ſince then, is fully illuſtrated by *Heylin* in his Microcoſm.

Fol. 568, 569.

II. When they came firſt into this Realm is not certainly related by any of the Hiſtorians in their Writings of *Britiſh* or *Saxon* King's Reigns; however, this certainly appears, that *William the Conqueror* tranſlated the *Jews* in *Roan*, from thence to *London*, *ob numeratum pretium*, for a Sum of Money given by them to him, who accordingly appointed them a Place to inhabit and trade in, which being aſſigned them, they were under the Protection and Patronage of the King, and as his meer Vaſſals, their Perſons and Goods being his alone, and that they could diſpoſe of neither of them without his Licence; and this appears by that ancient Law related by Sir *Henry Spelman*.

Holinſhed. Vol. 3 *pag.* 15.

Concil. 623.

De *Judæis* in Regno conſtitutis.

Spelman Concil. 623.

SCiendum eſt quoque, quod omnes Judæi ubicunque in Regno ſunt, ſub tutela & defenſione Domini Regis ſunt; nec quilibet eorum alicui diviti ſe poteſt ſubdere ſine Regis licentia. Judæi, & omnia ſua Regis ſunt. Quod ſi quiſquam detinuerit eis pecuniam ſuam, perquirat Rex tanquam ſuum proprium, (or detinuerit eos, vel pecuniam eorum, perquirat Rex ſi vult, tanquam ſuum proprium) as Sir *Henry Spelman* renders it.

III. Theſe People, after they had planted themſelves in this Iſle, and being thus protected, drove on the Trade and Traffick of the ſame with a mighty Hand, to ſuch a Height, that by the End of King *Rufus*'s Time, they became powerful, rich and numerous, and to that Degree ſo

zealous

zealous for their Religion, that they not only held open Diſputes, but endeavoured to bring over by Monies the poor and needy to be of their Opinion. So high and inſolent were they grown up in a ſhort time, which continued till King *Henry* the Second's Reign, at which time their Condition became a Grievance to the Nation, by reaſon of their Oppreſſions, Murders and Inſolencies, which that King taking into Conſideration, baniſhed the wealthieſt of them, and the reſt he fined at 5000 Marks. The moſt pernicious Act of Murder which they were accuſed of, was, that generally on a *Good Friday* they would, if poſſible, get a Child of Chriſtian Parents, and crucify him in deriſion of his Religion.

Joh. Bremton Col. 1048.
Gervaſius Dorobernenſis in his *Chronica, Col.* 1043.
Fox Vol. 1. *fol.* 305.

IV. King *Richard*, after his Return from the *Holy Land*, taking into Conſideration the Neceſſities and Straits that that expenſive Expedition had brought him under, and being deſirous to reduce the Monies and Eſtates of the *Jews* into ſuch a Condition, as if Neceſſity ſhould compel him to ſeize on the whole; but before the ſame could be done, it was propounded, that the King declaring his being ſenſible of the State and Condition of the *Jews*, a Means might be found out for the ſetling and peaceable driving of Commerce between the Chriſtians and them; whereupon Judges were appointed to hold Courts touching the Government of the *Jews*, and their Commerce was appointed out in theſe Words:

Matthew Paris, fol. 641.
Rot. Pat. 41. *H. B. m.* 4. *num.* 6. *Cok.* 4. *Inſtit. fol.* 254.
Joh. Brompton, Collect. 1258.
Hollingſhed Vol. 3. *p.* 155.

All the Debts, Pawns, Mortgages, Lands, Houſes, Rents and Poſſeſſions ſhall be regiſtered, the Jew, *who ſhall conceal any of theſe, ſhall forfeit to the King his Body, and the Concealment, and likewiſe all his Poſſeſſions and Chattels; neither ſhall it be lawful to the* Jew *ever to recover the Concealment; alſo ſix or ſeven Places ſhall be provided, in which they ſhall make all their Contracts, and there ſhall be appointed two Lawyers that are Chriſtians, and two Lawyers who are* Jews, *and two legal Regiſters, and before them and the Clerks of* William *of the Church of S.* Maries, *and* William *of* Chimilli ſhall their Contracts be made, and Charters ſhall be made of their Contracts by way of Indenture, and one Part of the Indenture ſhall remain with the Jew ſealed with this Seal, to whom the Money is ſent, the other Part ſhall remain in the Common Cheſt, wherein ſhall be three Locks and Keys, whereof the two Chriſtians

ſhall keep one Key, and the two Jews another, the Clerks of William of St. Maries Church and William of Chimilli ſhall keep the third; and moreover there ſhall be three Seals to it, and thoſe who keep the Seals ſhall put the Seals thereto. Moreover the Clerks of the ſaid William, and William ſhall keep a Roll of the Tranſcripts of all the Charters; and as the Charters ſhall be altered, ſo let the Roll be likewiſe; for every Charter there ſhall be 3 *d.* paid, one Moiety thereof by the Jew, and another Moiety by him to whom the Moiety is ſent, whereof the two Writers ſhall have 2 *d.* and the Keeper of the Roll the 3 *d.* and from henceforth no Contract ſhall be made with, nor any Payment made to the Jews, nor any Alteration made of the Charters but before the ſaid Perſons or the greater Part of them, if all of them cannot be preſent, and the aforeſaid Chriſtians ſhall have one Roll of the Debts and Receipts of the Payment which from henceforth are to be made to the Jews, and the two Jews one, and the Keeper of the Roll one. Moreover, every Jew ſhall ſwear upon his Roll, that all his Debts and Pawns, and Rents, and all his Goods and Poſſeſſions, he ſhall cauſe to be enrolled, and that he ſhall conceal nothing, as is aforeſaid; and if he ſhall know that any one ſhall conceal any thing, he ſhall ſecretly reveal it to the Juſtices ſent unto them, and that they ſhall detect and ſhew unto them all Falſifiers and Forgers of Charters, and Clippers of Monies, when and where they ſhall know them, and likewiſe all falſe Charters.

See *Purchas's* Pilgrimage, *l.* 2. *c.* 10. §. 7.

It's conceived the Star-Chamber was the old Receipt where the Cheſt for *Weſtminſter* remained with the *Stars* of that City, and not ſo called, as it is mentioned, *Co.* 4. *Inſt.* 66. Some of them are now extant in the Treaſury of the Exchequer in King *John's* Reign.

V. This Cheſt was called *Arca Chirographica*, or *Chirographorum Judæorum*, and the Notaries and Regiſters of them ſtiled *Chirographi Chriſtiani* and *Judæi Arcæ Chirographicæ London*, *Oxon*, or other ſuch City where ſuch Cheſts were uſually kept. All their Deeds, Obligations and Releaſes were uſually called Stars and *Starra*, *Starrum*, *Star* in our Latin Records, from the *Hebrew* Word (as Mr. *Selden* obſerves *Shetar* contracted by the Omiſſion of *he*) which ſignifieth a Deed or Contract. Theſe Stars were for the moſt Part writ in the *Hebrew* Tongue alone, or elſe in *Hebrew* on the one Side or Top of the Parchment, and in *Latin* on the other Side or Bottom of the Deed after the *Hebrew*.

If any Chriſtian became indebted to any *Jew* by ſuch Star or Writing put up and reſerved in his Cheſt, and paid not his Money at the Day appointed, together with all the Intereſt where any Intereſt was reſerved, then he ſued forth Letters by way of Proceſs againſt him both for the Debt and Intereſt under the Notary's or Regiſter's Hand, to appear before the Juſtices eſpecially appointed for the Government and Cuſtody of the *Jews*, to recover the ſame; but yet ſuch *Jew* could not obtain ſuch Licence till he had paid a Fine to the King for the obtaining of ſuch Letters, *unum Beſantum*, *viz.* *Beſantum* for every Pound; and ſuch *Stars* were in the Nature of Judgments, upon which Extents were ſued forth, and the Lands of the Debtors were ſeizable, notwithſtanding in whoſe Hands ſoever they came, after the Star was entred into *: And if it happened, that any Perſons denied their Deeds, or any Controverſy did ariſe upon which there was any Tryal, the ſame was by a Jury half of Chriſtians, and the other of ſix legal *Jews*. *Vide* Fine Rolls 6. *Johan.* *m.* 17. and likewiſe in *H.* 3. & *Ed.* 1. * Fines 9. *Joh.* *memb.* 5.

Such Stars or Cheſt-Judgments were aſſignable to Chriſtians, together with the Extents upon them, and the Aſſignee might vouch over the Aſſignor to Warranty in ſuch caſe. So likewiſe to the King they might aſſign over Debts to pay their Taxes. *Pat.* *pars* 2. *An.* 3. *Hen.* 3. *m.* 1.

VI. As this Politick Prince had provided this Means for the diſcovering of their Eſtates, ſo did he from time to time award Commiſſions to Juſtices for the Tryal of Cauſes and Controverſies that aroſe between Chriſtian and *Jew*, and granted them divers Liberties and Privileges, which afterwards were confirmed by theſe two enſuing Charters of King *John*.

JOhannes Dei Gratia, &c. Sciatis nos conceſſiſſe omnibus Judæis Angliæ & Normaniæ, libere & honorifice habere reſidentiam in terra noſtra & omnia illa de noſtris; & omnia illa quæ modo rationabiliter tenent in terris & feodis, & vadiis akatis ſuis: & quod habeant omnes libertates & conſuetudines ſuas ſicut eas habuerunt tempore prediċti Regis H. Avi patris noſtri, melius & quietius & honorabilius, Et ſi querela orta fuerit inter Chriſtianum & Judæum, ille qui alium appellaverit ad querelam ſuam dirationendam, habeat Teſtes, ſcilicet legitimum Chriſtianum *Chart.* 2. *Joh.* *n.* 49. *Charta* *Judæorum* *Angliæ.*

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anum & Judæum. Et ſi Judæus de querela ſua Breve habuerit, Breve ſuum erit ei teſtis. Et ſi Chriſtianus habuerit querelam adverſus Judæum ſit judicata per Pares Judæi. Et cum Judæus obierit, non detineatur corpus ſuum ſuper terram, ſed habeant homines pecuniam ſuam & debita ſua, ita quod mihi non diſturbetur, ſi habuerit hæredem qui pro ipſo reſpondeat & rectum faciat de debitis ſuis & de foriſfacto ſuo. Et liceat Judæis omnia quæ eis apportata fuerint ſine occaſione accipere & emere, exceptis illis quæ de Eccleſia ſunt & panno ſanguine lento. Et ſi Judæus ab aliquo appellatus fuerit ſine teſte, de illo appellatu erit quietus ſolo Sacramento ſuo ſuper librum ſuum, & de appellatu illarum rerum quæ ad Coronam noſtram pertinent, ſimiliter quietus erit ſolo Sacramento ſuo ſuper Rotulum ſuum. Et ſi inter Chriſtianum & Judæum fuerit diſſentio de accommodatione alicujus pecuniæ, Judæus probatum Catallum ſuum, & Chriſtianus lucrum. Et liceat Judæo quiete vendere vadium, poſtquam certum erit, eum illud unum annum & unum diem tenuiſſe. Et Judæi non intrabunt implacitum, niſi coram Nobis, aut coram illis qui carias noſtras cuſtodierint, in quorum Ballivis Judæi manſerint. Et ubicunque voluerint, cum omnibus catallis eorum ſicut res noſtræ propriæ, & nulli liceat eas retinere, neque hoc eis prohibere. Et præcipimus quod ipſi quieti ſint per totam Angliam & Normaniam de omnibus conſuetudinibus & Theloniis & modiatione vini ſicut noſtrum proprium catallum. Et mandamus vobis & præcipimus quod eos cuſtodiatis, & defendatis, & manu-teneatis, & prohibemus ne quis contra chartam iſtam de his ſupradictis eos in placitam ponat ſuper foriſfacturam noſtram ſicut Charta Regis H. Patris noſtri rationabiliter teſtatur. Teſte T. Humf. filio Petri com. Eſſex, Willielmo de Mereſcal. Com. de Pemb. Henr. de Bohun Com. de Hereford. Robert de Turnham, Willielmo Brywer. &c. Dat. per manum S. Well. Archidiac. apud Marleberg, decimo die Aprilis Anno Regni noſtri ſecundo.

Chart. 2. Johan n. 53. confirmatio Judæorum de Libert. ſuis.

JOhannes Dei Gratia, &c. Sciatis nos conceſſiſſe, & preſenti carta noſtra confirmaſſe Judæis noſtris in Anglia, ut exceſſus qui inter eos emerſerint, exceptis hiis qui ad Coronam & Juſtitiam noſtram pertinent, & de Morte hominis & mahemio, & de aſſaltu præmeditato, & de fractura domus, & de raptu, & de Latrocinio, & de combuſtione,

tione, & de Theſauris, inter eos deducantur ſecundum Legem ſuam, & emendentur, & Juſtitiam ſuam inter ſeipſos faciant. Concedimus etiam eis, quod ſi quis eorum alium appellaverit de querela quæ ad eos pertineat, Nos neminem compellemus ad teſtimonium cuiquam eorum contra alium exhibendum, ſed ſi appellator rationabilem & idoneum teſtem habere poterit, eum ſecum adducat. Si quod vero opus ſcelaratum & apertum inter eos emerſerit quod ad Coronam noſtram vel ad Juſtitiam pertineat; ſicut de prædictis Placitis Coronæ licet nullus eorum noſter appellator fuerit, Nos ipſam querelam faciemus per Legales Judæos noſtros Angliæ inquiri ſicut Charta Regis H. Patris noſtri rationibiliter teſtatur. Teſte G. filio Petri com. Eſſex, Willielmo Mareſchallo com. de Pembr. Hen. de Bohun com. de Hereford, Petro de Pratell. Roberto de Turnham, Willielmo de Waren, Hugo de Nevil, Roberto de Veteri Ponte. Dat. per manum S. Well. Archidiac. apud Merleberg decimo die Aprilis Anno Regni noſtri ſecundo.

VII. This Court being thus erected for the Government of the *Jews*, under Colour of the ſame, there were many Evaſions found out to avoid the Puniſhments which they juſtly acquired for their ſeveral Delinquencies; and therefore when any of theſe *Jews* were convicted before any of the Eccleſiaſtical Judges for Offences againſt an Eccleſiaſtical Perſon, or for Eccleſiaſtical things, or for Sacrilege, or for laying of violent Hands upon a Clerk, or for Adultery with a Chriſtian Woman, the Conuſance of the Cauſe was always avoided by the King's Prohibition, becauſe (as was alledged) they had their proper *delegated Judges* who ſhould and ought to have Conuſance of ſuch things; ſo that if a *Jew* happened to be convened before the Judges aſſigned for ſuch things, upon denial of the ſame by the Perſon alone, the ſimple Aſſertion of another *Jew* and of one Chriſtian without the adminiſtring of any Oath, they might have purged themſelves, the Proof of the Proſecutor being utterly rejected.

Cok. 4. *Inſtit. fol.* 254.

Matthew Paris additamenta, fol. 202, 207.

VIII. By the *Canon Law* no *Jew* could build or erect a Synagogue; for if he did, the ſame was ſeizable into the Crown: The like was ſo done in the Year 1231. when they had erected and new-built a curious Structure for a Synagogue, the ſame was taken into the King's Hand *, and dedicated

Decret. Gratian, lib. 5. *Surius Concil. Tom.*3. *p.*726.

* *John Stow's Chron. fol.* 182.

dedicated to the *Bleſſed Virgin*, and afterwards granted to the Brethren of St. *Anthony* of *Vienna*, and called St. *Anthonie's* Hoſpital; but yet an old * Synagogue they might repair.

* *Decret.Gratian. lib.* 5.

Matthew Paris Hiſt. Angl. fol. 393.

King *Henry* the Third finding that many of the *Jews* were converted to the Chriſtian Faith, but yet were notwithſtanding perſecuted by their Brethren, erected a convenient Houſe and Church, with all neceſſary Accommodations, and called it by the Name of the *Houſe of Converts*, in which Place, if any would live a retired Life, they had all Accommodations granted them for their Lives; which Place continued a Houſe of Alms and Receptacle for the converted *Jews* conſtantly down till 18 *Ed.* 3. and then there proved a Failure of ſuch Converts, and the Place became empty and ruinous; whereupon that Prince in the eighteenth Year of his Reign granted the ſame Houſe to other poor People who had nothing to live on, with the Benefit and Accommodation of the Gardens and other things, and an Alms of 1 *d.* a Day out of the *Excbequer* to each poor Perſon: Which Place one *William de Bunſtal* being made Guardian of, and likewiſe at that time Maſter of the Rolls, afterwards obtained of that King to annex the ſame Houſe and Chapel of the Converts to the Maſter of the Rolls and his Succeſſors for ever.

51 *E.* 3. *m.*20.

4 *Concil. Toledo, Can.* 59, 61, 62. *Grat.Diſt.*28. *qu.* 1. & 29. & *qu.* 1.

The Conſtitution of this Society (when it was in being) was purſuant to the *Cannon Law*; for by that it was decreed, reciting, *That in regard the Companies of evil Men do oftentimes corrupt even the good, how much more then thoſe who are prone to Vices? Let therefore the* Jews, *who are converted to the Chriſtian Faith, have no further Communion henceforth with thoſe who ſtill continue in their old* Jewiſh *Rites, leſt peradventure they ſhould be ſubverted by their* Jewiſh *Society.* Therefore We decree, *That the Sons and Daughters of thoſe* Jews *who are baptized, and that do not again involve themſelves in the Errors of their Parents, ſhall be ſeparated from their Company, and placed with Chriſtian Men and Women fearing God, where they may be well inſtructed, and grow in Faith and Chriſtian Manners.* And further by the ſame Council it was decreed, *That if a* Jew *ſhould have a Wife converted to the Faith, they ſhould be divorced, unleſs upon admonition the Husband would follow.*

IX. However theſe People having got footing for their Perſons, ſoon obtained Licence notwithſtanding againſt the expreſs Canons, not only for the erecting of Synagogues, but alſo obtained a Charter, whereby was *granted to one* James *of* London, *a Jewiſh Prieſt, the Prieſthood of all the* Jews *throughout all* England, to have and to hold it during his Life freely, quietly, honourably and intirely, without Moleſtation, Trouble, or Diſturbance by any Jew or Engliſhman in the Exerciſe thereof, &c. And in the very cloſe of the ſame there is alſo granted, That he ſhould not be impleaded for any thing appertaining to him, but only before the King himſelf, or his Chief Juſtice. This Charter was made at *Roan*, from whence the Conqueror firſt tranſplanted theſe People into this Realm.

Rot. 1 *Reg. Johannis, part* 1. *m.* 28. *Chart.* 17. *Vide Co.* 2. *Inſt. fol.* 508. the ſame at large.

X. And though they obtained footing in moſt of the great Places of *England*; yet ſome there were who obtained ſuch favour as to be exempted of their Company, as *New-caſtle*, to which Corporation it was granted, That no *Jew* from thenceforth ſhould remain or reſide in their Town during the Reign of King *Henry* the Third, or his Heirs; ſo likewiſe they of *Southampton*, *Winchelſea*, *Wicomb*, *Newberry*, *Berkhamſted*, and other Places.

Clauſ. 18 *Hen.* 3. *m.* 16. *Vide Chart.* 18 *H.* 3.

If a *Jew* died and left an Infant, the Houſe did eſcheat to the Crown, until the ſame was redeemed by the Heir at full Age, and in the *interim* the King might grant the ſame till he came of Age, together with all his Goods, Chattels, Lands, Tenements and Hereditaments, and then upon Payment of their Fines, they had a ſpecial Writ of Reſtitution awarded to give them actual Poſſeſſion.

Clauſ. 5 *H.* 3. *m.* 17. *de dom. Judæorum.*

XI. By the Laws of *England*, if a Man died leaving Iſſue divers Sons, the Lands deſcended to the Eldeſt; but a *Jew* dying, leaving Iſſue divers Sons, after the Fine paid to the King, they all inherit Lands, Goods and Chattels in a kind of *Coparcenary* *. So likewiſe by the Law of the Realm, if a *Jew* died ſeized of Lands, his Wife could not by the *Common Law*, bring a Writ of Dower; yet ſhe might bring a Plaint before the Juſtices aſſigned for the *Jews* in the Nature of a Writ of Dower, and ſhould there recover, nevertheleſs ſubject to anſwer the King a Fine, nay, though the Huſband was converted to the Chriſtian Faith †.

Selden. de ſucceſſionibus apud Hebræos, c. 20.

* But that was by the Eſtabliſhment of the Juſtices appointed for the *Jews*.

† *Cok.* 1 *Inſt. fol.* 31, 32. *Clauſ.* 28. *H.* 3. *m.* 4. *dorſo. Clauſ.* 36 *H.* 3. *m.* 26. *pro quadam Judæa.*

H. 3. m. 3. The Power of Excommunication was granted the *Jews* to excommunicate any of their own Profeſſion; but the ſame could not be done by them without Licence.

XII. Notwithſtanding all theſe Privileges and indulged Liberties which were granted to them by thoſe Kings from the Conqueror to that their fatal Year in 18 *E.* 1. yet they were in no other Condition but moſt abſolute Bond-ſlaves, and exquiſite Villains, for their Names were enrolled in the 36 *H.* 3. *m.* 6. King's *Exchequer* for the *Jews*, and they confined to live and abide only in ſuch Places as thoſe ſeveral Kings, or their Juſtices aſſigned for their Cuſtody, ſhould preſcribe and allot them, from which they might not remove without ſpecial Licence, but always be reſident, that ſo the King's Officers might on all Occaſions find both them and their Families, and then as often as the King's Pleaſure was, were they tranſlated from Place to Place, and not ſuffered to have any Habitation but where they had a common Cheſt, and where Taxes were impoſed on them, or Debts were owing from them to the Crown, their Perſons, Wives, Children, Infants, Families were impriſoned and ſent to remote Places and Caſtles, nay baniſhed, executed, and put to Fines and Ranſoms upon all ſuch Occaſions as thoſe Kings thought fit; they were ſold either Perſon by Perſon, or in wholeſale, as Bondſlaves or Villains in groſs by the King, and mortgaged to thoſe who would accept them as a Pledge, or otherwiſe advance any Monies upon their Aſſignment.

2 *Clauſ.* 2. *H.* 3. *m.* 10. *dorſ.* XIII. And that they might be diſtinguiſhed from others, they were obliged always to bear a Badge and Table on their outmoſt Garments, as well Females as Males, whereever they rode or went, to diſtinguiſh them from Chriſtians, with whom they were to have no intimate Communion, nor could the Chriſtians be Servants or Nurſes to the *Jews* in any kind, their State and Condition being ſuch, that they were all of them meer Slaves and Servants to the King in one kind or other.

When they had entered the Realm, they were abſolutely prohibited to depart without ſpecial Licence; the which they hardly and but ſeldom could obtain, and if they attempted it, the which they ſometimes would do to avoid the heavy Taxes that were laid on them, they were impriſoned and put to ſevere Fines and Ranſoms,

XIV.

XIV. As for their Real and Perſonal Eſtate, it was wholly at the Diſpoſal of the King; for he might ſeize all their Lands, Houſes, Rents, Annuities, Fees, Stars, Mortgages, Debts, Goods and Chattels whatſoever, and ſell, grant, releaſe and give them to whom he pleaſed at his Pleaſure.

Clauſ. 15 Joh. memb. 13. Fine 7. H. 3. mem. 2. part. 1. Ebor.

At their Deaths their whole Eſtate, both Real and Perſonal, eſcheated to the King; neither could their Heirs or Executors, Wives and Kindred have or enjoy them without making Fines, Releaſes, and Compoſitions, with the King for them.

Clauſ. 5 H. 3. m. 17. de dom. Judæorum.

And when they had Occaſion to ſue or implead any Perſon upon any Account, Real or Perſonal, they could not proceed till Licence obtained, which always was upon Fines made; and thoſe very Actions, after they were commenced, he could ſtay, and the very Debts which they proſecuted for, he might reſpite Payment of Principal or Intereſt, and give what Time he pleaſed; nay, he could not only lower or leſſen the Sums mentioned in their ſeveral Charters, but he might releaſe them for ever; and though the King might pardon or releaſe a Debt, yet he might notwithſtanding revive * the ſame. And thoſe publick Cheſts, the common Repoſitory of all their Fortunes, they often ſeized and ſealed up the ſame, and diſpoſed what of them they pleaſed to the King's own Uſe, notwithſtanding their Charters and Grants of Privilege, nay, forced them ſometimes to tax and diſtrain one another under Pain of perpetual Impriſonment, Baniſhment, Confiſcation of all their Eſtates, and the moſt ſevere Penalties that could be inflicted, they living purely under an unceſſant and arbitrary Will of thoſe ſeveral Kings; and that which was the more to be admired, that if they turned Chriſtians, they immediately upon their Converſion forfeited all their Eſtates to the Crown. At length King *Edward* the Firſt having ſought all ways that might be to reform the exorbitant Uſuries and Oppreſſions which they daily committed, did, through the earneſt Sollicitation of the Commons, publiſh an Edict in Parliament for their total and univerſal Baniſhment, which accordingly was done, and the King at that Time ſent his Letters and Letters Patents to ſeveral Sea-Towns, reciting, that he had preſcribed a certain Time for their Departure out of the Realm, commanding them not

Clauſ. 7. Johan. Reg. m. 26.

Clauſ. 9. Johan. Reg. m. 5, & 6.

* *Clauſ. 35 H. 3. m. 5. dorſ.*

Hillar. An. 52. H. 3. Rot. 9. in the Exchequer.

its Foundations from the Courage of Men, and from their Valour, there is certainly no Vocation in the which there is ſo much required as in this; they are not only to encounter and ſtrive amongſt Men, but ſometimes againſt the four Elements together, which is the ſtrongeſt Proof that can be of the Reſolution of Man. This hath been the Occaſion, that ſome have been of Opinion, that they ſhould open this Door to Merchants to attain to *Nobility*, ſo as the Father and Son have continued in the ſame Trade, and to ſuffer Noblemen, who are commonly the richeſt in Eſtates, to practiſe themſelves (without Prejudice to their Condition) in this of Commerce; the which would be more honourable unto them than to be Uſurers and Bankers, as in *Italy*; or to impoveriſh themſelves in doing nothing but ſpend, and make Conſumption of their Fortunes, and never gathering or laying up.

Præter mercaturæ uſum Naves rei militari & tutandæ in mari contra externam vim reipub. inſervire cæperunt, Ariſtot. 7. *Polit.* 6. Mare & claſſem in bello eſſe tutelam reipub. *ait Tacitus* 5. *Hiſt. Claſſes* Imperii munimenta *vocant Athenienſium legati apud Thucydidem, lib.* 1. *H. Orat. ad Lacedæmon. fortunas Greciæ in navium præſidio ſitus fuiſſe prædicant, ejus rei muri ligni* Themiſtoclis *abunde fidem fecerunt, idem experientia ſatis hodie loquitur, Inde* Coſmo Medicæo *familiare fuit dictum,* Non habendum potentem qui potentiæ terreſtri, non ſimul etiam navalem haberet conjunctam. *Et Hiſpanorum eſt adagium,* Regnum ſine portu eſſe ſicut furnum abſque igne: *Præterquam quid navigationes cultui vitæ, & artium traductioni Coloniarium valetudine, & voluptati ſerviunt.*

The moſt uſual way of buying and ſelling of Commodities, between Merchants beyond Seas, is by Bills of Debt, or Obligatory, called Bills Obligatory, which are there by the Law Merchant Alienable or Aſſignable, tho' not by our Law, as being held as *choſes en Action*, where no Property can paſs by Aſſignment or Alienation, though certainly it would be of great Convenience, were they by Act of Parliament made aſſignable, as, by Cuſtom, their Bills of Exchange are by Endorſement. *Lex mercat.* 71.

The Form of ſuch a Bill Obligatory.

I, *A. B.* Merchant of *Amſterdam*, do acknowledge by theſe Preſents to be truly indebted to the honeſt *C. D. Engliſh* Merchant dwelling at *Middleborough*, in the Sum of 500 *l.* currant Money for Merchandize, which is for Commodities received of him to my Contentment; which Sum of 500 *l.* as aforeſaid, I do promiſe to pay unto the ſaid *C. D.* (or the Bringer hereof) within Six Months next after the Date of theſe Preſents. In Witneſs whereof, I have ſubſcribed the ſame at *Amſterdam*, the 10th Day of *July*

1704.

1704. *Stilo novo.* Sometimes, and in ſome Countries, this Bill is ſealed. And if ſuch Bill be made beyond Seas, by 2, 3, or more Perſons, as having bought a Commodity as Partners together, or taking up Monies together at Intereſt; wherein they bind themſelves all as principal Parties or Debtors, yet every one is bound to pay but his own Part, by the *Civil Law*, and Cuſtom of Merchants. *Lex. Mercat.* 74. 75.

Merchants ought to be very wary and circumſpect in their giving a Character one of another, as to their Credit in their Dealings as to each others Ability, leſt unawares they become Sureties, where not ſo much is intended. To which End I ſhall cite a Caſe in *Lex Mercat. cap.* 10. *fol.* 69. which was this. A Merchant being at *Franckfort* in *Germany*, during the Mart-Fair there, went into a Merchant's Warehouſe to confer of ſome Buſineſs with him, where he found another Merchant of his Acquaintance cheapening a Parcel of Silk Wares of the ſaid other Merchant, to whom this Man (as it ſeemed) was unknown; whereupon the Seller of the ſaid Silk-Wares took occaſion to aſk of him, whether he were a good Man, and of Credit, who anſwered he was. So the Bargain was made, and the Goods delivered to the ſaid Merchant, the Buyer, to the Value of 460 *l.* For the which he made a Bill Obligatory, payable the next Fair following; at which time the Buyer not appearing, Demand was made of the Merchant that gave the Buyer the Character of being a good Man, and of Credit, who in his Defence did alledge, that what he ſaid was but only a bare Character, and at moſt was but *Nudum Pactum ex quo non oritur Actio*, and ſo not bound to pay the ſame, as having had no Conſideration for it: And upon Suit thereupon, he was adjudged to pay the ſaid 460 *l.* All he had for a Recompenſe to reimburſe himſelf, was the Buyer's Bill Obligatory made over to him, which proved of no Avail, for that the Buyer became inſolvent. Note, this was by the *Civil Law* and general Law and Cuſtom between Merchants. Though I conceive this would not in any wiſe avail in our Law, but thought fit to add this Caſe as a Caution to Merchants. If he had ſaid, he is taken or reputed to be a Man of good Credit, or, I take him to be ſo, he had been cleared by the Law, and the Cuſtom of Merchants. Surety, tho' not intended.

Action of Debt was brought by a *Conceſſit ſolvere*, according to the Law Merchant, and the Cuſtom of the City of *Briſtol*, *Godbolt*. 49.

If

Two Partners one makes a Factor.

If two Men be Partners of Merchandize in one Ship, and one of them appoints and makes a Factor of all the Merchandizes, both of them may have Writs of Account againſt him, or they may join in one Writ, *Tamen quære*, *Godbolt.* 90. *Faſhion cont. Atwood.*

Account by one joint Factor for the other.

One joint Factor may account without his Companion by the Law of Merchants, for Factors are oftentimes diſperſed, ſo as they cannot be both preſent at their Accounts. *Goore & als cont. Dawbeny*, 2 *Leon.* 75, 76.

Sale by a Factor, to one that becomes Bankrupt.

A Merchant delivered *Kerſies* to be ſold in *Spain*, the Factor ſells them to one who becomes a Bankrupt (and there is a Law in *Spain*, that if the Factor enter this before a Regiſter, and had a Teſtimonial, that he ſhall be diſcharged) we judge here that he ſhall be diſcharged. In *Capps* and *Tucker's Caſe.* 2 *Rolls. Repts.* 497.

Account againſt him.

Account for Goods received *ad Mercandizandum* is good by Ch. Juſt. *Hales*. And though declared againſt as Receptor general, yet ſhall not anſwer other Profits, and ſhall have Charges as a Bayliff. *Burdet cont. Threele.* 3 *Keble* 387.

Factor buys generally.

If a Servant or Factor buy Goods generally, and doth not upon the Contract declare that he only buyeth as Servant or Factor, he is chargeable in his own Right. *Degelder* againſt *Savory.* 2 *Keble* 812.

Where Account, not *Aſſumpſit*, lies againſt a Factor. 1 *Vent.* 113.

In account 'twas held *per Curiam*, that if a Man delivers Money to his Bayliff or Factor to lay out for him in Commodities, he cannot bring an *Aſſumpſit*, but only an Account; for it may ſo happen, that the Factor hath laid out more Money than he hath received.

Merchants Account *Stat. of Limit.* pleadable.

Indebitatus Aſſumpſit for 1000 *l.* for Monies had and received, and alſo an *Inſimul computaſſet*, upon Account; the 1000 *l.* became due; the Defendant pleaded the Stat. of Limitations. The Plaintiff replied that he is a Merchant, and the Proviſo and Exception for Merchants Accounts. By *Twiſden*, *Rainsford & Moreton abſente Kelyng*, ſtated Accounts between Merchants as this Caſe is, are not within the Proviſo, but only Accounts Currant, *Webber cont. Tyrell.* 1 *Levinz* 287. 2 *Keeble* 622. 2 *Sand.* 124. Where Judgment for the Defendant. Yet the Caſe of *Martin* and *Delboe*, 1 *Levinz* 298. to the contrary upon an Account ſtated between Merchants; yet the ſame Caſe, 1 *Mod.* 70. Judgment for Defendant, 2 *Keeble* 674. 1 *Vent.* 89. &

1 *Sid.*

1 *Sid.* 465. See likewiſe the Caſe of *Farrington* & *Lee.* 1 *Mod.* 268. & 2 *Mod.* 311.

II. Hence will grow many Advantages both to the publick and private: To the publick, for that they that ſhould deal in Commerce, having Means, Courage, and Sufficiency for this Conduct, it would be far greater in the furniſhing more Ships to Sea, and better armed, the which the State at need might make uſe of for the Safety of the Publick, and would add to the Reputation of the Nation in all Parts, they knowing that an Indignity or Damage offered to ſuch, would require Satisfaction with a ſtrong and powerful Hand; the which they cannot do, who being poor, and having but ſmall Stocks, or what they borrow from Bankers, or are indebted for the Cargo which they ſend forth, have not the Courage to hazard themſelves and their All in an Enterprize that is great. Beſides, ſuch who have Honour, Riches, and Courage, would keep up the Reputation of their ſeveral Commodities, by not leſſening the Market, whereas the *poorer ſort*, (*to pay Cuſtoms*, *Freight*, *Bills of Exchange*, *and other contingent and neceſſary Charges*, which accompany the importing and exporting,) are often forced to ſell for an inconſiderable Gain; nay, ſome rather than their Wants ſhould be known, will for ready Money ſell their Goods for even leſs than they coſt: All which would be prevented, if ſuch Perſons of Value would apply themſelves to a prudent Management of the ſame; for whatſoever Hazard they run, there would be more gotten by ſuch in two, than by the poorer ſort in three or four Voyages, and by that means it would be the Occaſion of avoiding many Expences, and prevent the importuning their Prince for Places, when perhaps they might get more at Sea in one Year, than in ten at Court. Beſides, Experience hath taught, and doth daily manifeſt, that where the moſt Subſtantial have dealt in Commerce, it hath inriched both them and the State under which they lived; and this preſent Practice of the *Venetians*, *Portugueze*, *Spaniards* and *Hollanders*, plainly demonſtrates.

Stat. 9, 10 *W.* 3. *c.* 15. Of ending Suits by Arbitrament. After the 11th of *May* 1698. All Merchants and Traders and others deſiring to end any Controverſy, Suit or Quarrel, for which there is no other Remedy but by perſonal Action or Suit in Equity, by Arbitrament may agree, that

Arbitrament, made a Rule of Court.

that their Submiſſion of the Suit to the Award or Umpirage of any Perſon or Perſons ſhould be made a Rule of any of his Majeſty's Courts of Record, which the Parties ſhall chuſe, and may inſert ſuch their Agreement in their Submiſſion, or the Condition of the Bond or Promiſe; and upon producing an Affidavit of ſuch inſerting, and upon Reading and Filing ſuch Affidavit in the Court ſo choſe, the ſame may be entred of Record, that the Parties ſhall ſubmit to, and finally be concluded by ſuch Arbitration or Umpirage. And in caſe of Diſobedience thereto, the Party neglecting or refuſing, ſhall be ſubject to all the Penalties of contemning a Rule of Court, and Proceſs ſhall iſſue accordingly, which ſhall not be ſtopped or delayed, unleſs it appear on Oath, that the Arbitrators or Umpire miſbehaved themſelves, and that ſuch Award was corruptly or unduly procured. In which caſe ſuch Arbitration or Umpirage ſhall be void and ſet aſide by any Court of Law or Equity, ſo as ſuch Corruption or undue Practice be complained of, in the Court where the Rule is made for ſuch Arbitration, before the laſt Day of the next Term, after ſuch Arbitration made and publiſhed to the Parties.

Which Clauſe may be to the Purpoſe following, at the End of the Condition, *viz.* And the abovementioned *A. B.* doth agree and deſire that this his Submiſſion to the Award above-mentioned be made a Rule of His Majeſty's Court of King's Bench, purſuant to the late Act of Parliament, for this Purpoſe provided.

The like for the other Party ſubmitting to ſuch Award.

Salk. 72. *pl.* 8. A Submiſſion was to an Award by Bond, and at the End of the Condition of the Bond was this Clauſe: *And if the Obliger ſhall conſent that this Submiſſion ſhall be made a Rule of Court, that then,* &c. Upon Motion to make this Submiſſion a Rule of Court, it was oppoſed, becauſe theſe Words do not imply his Conſent; but if he would forfeit his Bond, he need not let it be made a Rule of Court; yet becauſe this Clauſe could be inſerted for no other Purpoſe, the Court took theſe conditional Words to be a ſufficient Indication of Conſent, and made the Award a Rule of Court.

Salk. 73. *pl.* 10. *Farreſley* 8. A Matter was referred by Conſent at *Niſi prius* to the three Foremen of the Jury; and before the Award was made, one of the Parties ſerved the Arbitrators with a *Subpœna* out of *Chancery*, which hindered their proceeding to make

make the Award. And the Court held this a Breach of the Rule, and granted an Attachment, *Niſi Cauſa*.

Upon a Submiſſion to the Award of the three Foremen of the Jury, who made their Award, the Defendant moved to ſet it aſide; becauſe they went on without giving him Time to be heard, or produce a Witneſs: And *Holt* Chief Juſtice ſaid, the Arbitrators being Judges of the Parties own chuſing, the Party ſhall not come and ſay they have not done him Juſtice, and put the Court to examine it: *Aliter*, where they exceed their Authority: however, the Award was examined and confirmed, and the Plaintiff moved for an Attachment for not performing it, and the Court held, that the Non-performance, while the Matter was *Sub Judice*, was no Contempt: then the Plaintiff moved for his Coſts, and that was denied; upon which *Powel* Juſtice ſaid, that ſeeing they could not give the Party any Coſts, he ſhould never be for examining into Awards again. *Salk.* 73. *pl.* 11.

H. bound himſelf in a Bond to ſtand to the Award of *J. S.* which Submiſſion was made a Rule of Court. The Party, for whoſe Benefit the Award was made, moved the Court for an Attachment for *Non-performance*, which was granted: pending that, he brought an Action of Debt upon the Bond; upon this Serjeant *Darnell* moved that he might not proceed both ways; and likened it to the Caſes, where the Court ſtays Actions on Attorney's Bills, while the Matter is under Reference before the Maſter. *Sed per Curiam*, the Motion was denied, and this Difference taken; where the Court relieves the Party by way of Amends in a ſummary way, as in the Caſe cited, there it is reaſonable; otherwiſe here, where the Plaintiff has no Satisfaction upon the Attachment, and the Defendant was put to anſwer Interrogatories. *Salk.* 73. *pl.* 12.

Attachment lies not for not performing an Award made upon a Rule of Court without a Perſonal Demand. *Holt* Chief Juſtice remembered the firſt Attachment of this kind was in Sir *John Humble*'s Caſe in *Kelyng*'s Time, in which, and ever ſince, a Perſonal Demand has been thought neceſſary. In ſuch Caſes of Awards, though they be not legally good, an Attachment lies for Non-performance, *aliter*, if impoſſible: but the Party is excuſed as to that Part which is impoſſible only. *Salk.* 87 *pl.* 1.

Salk. 84. pl. 3. If a Rule be made at *Niſi prius* to refer a Matter to the three Foremen of the Jury, and that the Plaintiff may either enter up Judgment on the Verdict, or have an Attachment for not obeying the Rule of Court, it being in his Election which way he will execute the Award; and this was affirmed by Mr. *Northey*, and at the Bar, to be the conſtant Practice. *Tourton* and *Gould* (in the Abſence of the Chief Juſtice) doubted of it, becauſe the Verdict ſtood ſtill on Record; to which Mr. *Northey* anſwered, there could not be a Judgment entered on ſuch Verdict without Leave of the Court: And the Attachment was granted.

III. To engage Perſons of Rank and Fortune in Trade, that induſtrious Nation the *Burgundians* procured the Aſſociation or Incorporation by *John* Duke of *Brabant*, of that ancient Company of the Adventurers, *Anno* 1248. which were then called the Brotherhood of St. *Thomas Becket* of *Canterbury*; which being afterwards tranſlated into *England*, was by *Edward* the Third confirmed, and by his Succeſſors *Henry* the Fourth, *Henry* the Fifth, *Edward* the Fourth, *Henry* the Sixth, *Richard* the Third, and King *Henry* the Seventh, who gave them the Name of Merchant-Adventurers, and from him ſucceſſively hath their Charter been confirmed down to, and by his ſacred Majeſty that now is; and as this Society is of ancient Eſtimation, ſo is their Government very commendable.

IV. The Society of the Company trading to the *Eaſt-Indies*, differs from others, both as in reference to the Perſons and Members, which are at this Day many of the principal Nobility of *England*, as alſo for that their Adventurers run all into many Stocks, and is governed and carried on jointly upon Benefit and Loſs; they were incorporate, *Anno* 1599. and ſince they ſurrendered their Charter, and accepted a new one, and are incorporated by the Name of *Governor* and *Company trading to the* Eaſt-Indies; their Adventurers run all into one *general Stock*, and is governed and carried on upon Benefit and Loſs; the ſame being at this Day, according to the Subſcriptions, about * four hundred thouſand Pounds, which the ſeveral Perſons ſubſcribers may ſell, transfer, and diſpoſe of; but they can no ways take out the ſame: The *Great Stock* may be increaſed, if the Company ſhall ſee Occaſion to permit it; but they are very cautious of the ſame, for that the greater the Dividends,

* Abundance more at this Time, under *The United Company.* What is ſaid in this Paragraph of the Stock relates to the old Company.

dends, the more Reputation the Stock bears, which above all things is to be maintained; however, directly upon his own Account, no Perſon can have above Ten thouſand Pound Stock there, nor can he have a compleat Title, till he is made a Freeman of that Society; their Returns are very profitable, and of late very rich, and have many Places of great Importance in *India*, as *Maſulapatan* on the Coaſt of *Coromandel*, *Bombay*, *Surat*, *Fort St. George*, *Bantam*, &c.

V. The *Dutch* having found Relief in their Diſtreſs from the *Britiſh* Shore, againſt their powerful Enemy, found alſo a Pattern to carry on Commerce; they not being wanting in the imitating the Incorporation of a Company, trading to thoſe Places which they poſſeſſed in the *Eaſt-Indies*; and therefore in the Year 1602. Leave was granted from the *States* to traffick into thoſe Parts before all others, during the Space of one and twenty Years, the which was granted them, in Conſideration of five and twenty thouſand Florins, which they promiſed to pay to the *States* during the firſt ten Years. Thus reduced all into one Company, *Amſterdam* had one Moiety, *Middleburgh* in *Zealand* a fourth Part, *Delft*, *Rotterdam*, *Horne*, and *Enchuyſen*, had each of them a ſixteenth Part, the whole Stock of this Union amounting to upwards of ſix Millions of Livres, or ſix hundred thouſand Pounds Sterling.

For the Direction of this Trade, and the Intereſts of the Aſſociates, they have eſtabliſhed in either of thoſe Towns, a certain Number of Adminiſtrators, at *Amſterdam* twenty, at *Middleburgh* twelve, in either of the reſt ſeven; and if any one dies, the Chamber of the Place names three, of which either the *States-General*, or the Magiſtrate of the Town chuſeth one.

Thoſe Chambers chuſe ſeventeen among the Adminiſtrators, that is to ſay, *Amſterdam* eight, *Middleburgh* four, *Delft* and *Rotterdam* two, *Horne* and *Enchuyſen* two; and the ſeventeen are choſen alternatively, ſometimes at *Middleburgh*, ſometimes at *North-Holland*; the which are called together to reſolve jointly of how many Ships, and of what Equipage and Furniture they ſhall make the Fleet, which they mean to ſend, and to what Fort or Coaſt they ſhould go. This Aſſembly is held ſix Years together at *Amſterdam*, and afterwards two Years at *Middleburgh*, and then again at *Amſterdam*; by the Conditions of the Accord the

Ships muſt return to the ſame Port from which they parted; and the Spices which are left at *Middleburgh*, and other Chambers, are diſtributed amongſt them by the Weight of *Amſterdam*, and the Chamber which hath ſold her Spices, may buy from other Chambers.

By this Order * they have hitherto continued this Commerce with Reputation, not as ſimple Merchants only, but as if they were Sovereigns, they have made in the Names of the *States*, Alliances with many of the Princes of thoſe Parts; as with the Kings of *Siam*, *Quadoen*, *Patam Johor*, the Heir of *Malaca*, *Borneo*, *Achin*, *Sumatra*, *Baretan*, *Jocotra*, and other Kings of *Java*; they have made themſelves abſolute Maſters of the Iſland of *Amboyna*, but by what Means?—Where they have a Preſident who governs in their Name; at *Banda* they have Fort for a Retreat, where they muſt deliver the Spices at a certain Price; in *Ternate* they have another a Mile diſtant from that of the *Portugueze*; at *Magniene* they have three; at *Motire* one; at *Gilolo* they have taken that which the *Portugueze* had built; and indeed whatſoever either can, or may conſiſt with their Intereſt in thoſe Parts, they have ingroſſed, and by that means almoſt the Trade of the whole Spices of the *Eaſt*.

* There are now ſome Variations.

VI. So likewiſe the moſt Chriſtian King hath within few Years eſtabliſhed ſuch another trading to thoſe *Eaſtern* Parts.

And in *England* we have ſeveral others, as that of trading to *Turkey*, that of *Africa* to *Guiney*, and ſeveral others, dividing the ſeveral Trades, according to the Coaſts and Places where they are appointed, forbidding them to intrench or incroach on each other; ſo likewiſe to all other his Majeſty's Subjects on ſevere Penalties.

VII. Now it is not the dividing of the Trade into Companies that can anſwer the Expectation, but it is the dividing the Trade into Companies, where the Places may bear it; as that to the *Indies*, *Turkey*, *Hamborough*, and ſome others: But to ſome others, as the *Canaries*, *France*, or any of thoſe Places on this Side the Line, it has been conceived the Trade will not anſwer it, but the ſame would be better diſtributed, either into the Trade of voluntary Aſſociations, or ſingle Traders; others perhaps would reſult into Monopolies, if incorporated; however, the Standard Rule is,

is, to know whether the Trade of the Place will bear a Company, or not.

The *Hudſon*'s *Bay* Company made a By-Law, that if any of their Members ſhould be indebted to the Company, his Stock in the Company ſhould be in the firſt Place liable to ſuch Debt, and that they might ſeize and detain it: this was held good in *Chancery*.

> 2. *P.* Williams 207, *&c.*

It is Foreign Trade that is the main Sheet Anchor of us Iſlanders, without which the Genius of all our uſeful Studies, and the which renders Men famous and renowned, would make them uſeleſs and inſignificant to the Publick. When Man has fathomed the Bottom of all Knowledge, what is it, if not reduced to Practice, other than empty Notion? If the Inhabitants of this Iſland were learned in all the Languages between the riſing and ſetting of the Sun, did know and underſtand the Situation of all Places, Ports, and Countries, and the Nature of all Merchandize and Commodities, were acquainted with the Order and Motion of all the Stars, knew how to take the Latitude and Longitude, and were perfectly read in the Art of Navigation, to what Purpoſe would all be, if there were no Foreign Trade? We ſhould have no Ships to navigate to thoſe Countries, nor occaſion to make uſe of thoſe Languages, nor to make uſe of thoſe Commodities; what would this Iſland be without Foreign Trade, but a Place of Confinement to the Inhabitants, who (without it) could be but a kind of Hermits, as being ſeparated from the reſt of the World; it's Foreign Trade, that renders us rich, honourable and great, that gives us a Name and Eſteem in the World, that makes us Maſters of the Treaſures of other Nations and Countries, and begets and maintains our Ships and Seamen, the Walls and Bulwarks of our Country; and were it not for Foreign Trade, what would become of the Revenue for Cuſtoms, and what would the Rents of our Lands be? The Cuſtom would totally fail, and our Gentlemen's Rents of Thouſands *per Annum*, would dwindle into Hundreds.

> *Les advantages de Commerce à la Eaſt-India.*

VIII. Merchants in *England* were always favourably provided for by the *Common Law* of this Kingdom. By the ancient Laws of King *Alfred* it was provided, **Defendue fuit que nul Merchant-Alien ne hantaſt Angleterre, forſque aux quatre Faires, ne que nul demeuraſt in la terre outre quarante jours**: *Mercatorum navigia, vel inimicorum quidem*

> *Miroür, cap.* 1. *Sect* 3.
> *Intr. leges Ethel. cap.* 2.

dem quæcunque ex alto (nullis jactata tempeſtatibus) in portum aliquem invehentur tranquilla pace fruantur, quinetiam ſi maris acta fluctibus, ad domicilium aliquod illuſtre, ac pacis beneficio donatum navis appulerit inimica, atque iſtuc nautæ confugerunt, ipſi & res illorum omnes auguſta pace potiuntur.

Magna Charta, cap. 30.

IX. Again, by the Grand Charter of our Liberties, they are provided for in theſe Words: *Omnes Mercatores niſi publicè antea prohibiti fuerint, habeant ſalvum & ſecurum conductum, exire de Anglia, & venire in Angliam, & morari, & ire per Angliam, tam per terram, quam per aquam, ad emendum vel vendendum ſine omnibus malis tolertis per antiquas & rectas conſuetudines, præterquam in tempore guerræ. Et ſi ſint de terra contra nos guerrina & tales inveniantur in terra noſtra in principio guerræ, attachiantur ſine damno corporum ſuorum, vel rerum, donec ſciatur a nobis, vel a Capitali Juſticiario noſtro, quomodo Mercatores terræ noſtræ tractantur, qui nunc inveniantur in terra illa contra nos guerrina; & ſi noſtri ſalvi ſint ibi, alii ſalvi ſint in terra noſtra.*

1. By which it is declared, that all Merchant-Strangers might be publickly prohibited to trade into this Realm, be they in Amity, or otherwiſe.

2. All Merchant-Strangers in Amity, except ſuch as be ſo publickly prohibited, ſhall have ſafe and ſure Conduct in ſeven things.

1. To depart out of } *England.*
2. To come into } *England.*
3. To tarry in } *England.*
4. By Water and Land to go in, and through } *England.*
5. To buy and ſell.
6. Without any manner of evil Tolls.
7. By old and rightful Cuſtoms.

Addit Canon, Mercatores, quod non tantum de his qui temporariam in hoſte moram agitant, intelligendum eſt, ſed ut de ſubditis perpetuis; nam & horum vita ab armis aliena: Eſt ac ſub hoc nomine continentur ſimul alii opifices & artifices quorum quæſtus pacem amat, non bellum. Grotius *de Jure belli, lib.* 3. *cap.* 11. § 12.

X. But concerning ſuch Merchant-Strangers, whoſe Prince is in War with the Crown of *England*, if they are found within the Realm, at the Beginning of the War, they ſhall be attached, with a Privilege and Limitation, *i. e.* without Harm of Body or Goods; with this Limitation, until it be known to the King, or his Chief

Juſtice,

Juſtice *, how Merchants of *England* are uſed and intreated in their Country, and accordingly they ſhall be uſed in *England*, the ſame being *Jus Belli*. But for Merchant-Strangers that come into the Realm after War begun, they may be dealt withal as open Enemies, it being the Policy of *England* ever to entertain Merchant-Strangers fairly. In the 18th Year of *Ed.* 1. in the Parliament Roll, it is contained thus: *Cives* London *petunt quod alienigeni Mercatores expellantur a Civitate, quia dicantur ad depauperationem Civium*, &c.—*Reſponſio*—*Rex intendit quod Mercatores extranei ſunt idonei & utiles magnatibus*, &c. *& non habet Concilium eos expellendi.*

* That is, the Keeper of the Realm in his Abſence.

Et in Republica maxime conſervanda ſunt jura Belli. Co. 2. *Inſtit.* fol. 58.

Rot. Parliam. 18 *E.* 1. *fol.* 4. *num.* 55.

However, though great Immunities were granted them, yet they always found Sureties that they ſhould not carry out the Merchandize which they brought in.

Rot. Vaſcon. 18 *Ed.* 2. *m.* 21.

XI. And at this Day *, if they bring in any Merchandize into the Realm, and ſell the ſame for Monies, they are to beſtow the ſame upon other Merchandizes of *England*, without carrying of any Gold or Silver in Coin, Plate or Maſs out, on Forfeiture; the principal Reaſon of this was as well to preſerve and keep the Gold and Silver within the Realm, as for the Increaſe of the Manufactures; and the ſame at this Day extends as well to Denizens, ſo made by Letters Patents, as Strangers; however, he may uſe the ſame in Payment to the King's Liege People, without † incurring the Penalty of the Statute of 4 *H.* 4. but yet in Strictneſs of Law, ought not to receive * any Gold in Payment.

* The Law is altered as to this Matter, ſince our Author wrote.

See above, lib. 2. *ch* 13. §. 10.

4 *H.* 4. *cap.* 5.
5 *H.* 4. *cap.* 9.

† *Stat.* 17. *E.* 4. *c.* 1. confirmed by 3 *H.* 7. *c.* 8.

* 8 *H.* 6. *c.* 14.

XII. All Merchant-Strangers that ſhall be made Denizens, either by the King's Letters Patents, or by Act of Parliament, muſt pay for their Merchandize like Cuſtom and Subſidy, as they ought, or ſhould pay before they were made Denizens.

11 *H.* 7. *c.* 14.
22 *H.* 8. *c.* 8.
1 *Eliz. cap* 1.
Co. 2. *Inſt. fol.* 742.

XIII. Every one that buys and ſells is not from thence to be denominated a *Merchant*, but only he who trafficks in the way of Commerce, by Importation or Exportation; or otherwiſe in the way of Emption, Vendition, Barter, Permutation, or Exchange, and which makes it his living to buy and ſell, and that by a continued Aſſiduity, or frequent Negotiation in the Myſtery of *Merchandizing*: But thoſe that buy Goods to reduce them by their own Art or Induſtry into other Forms than formerly they were of, are

Leg. unic. Cod. de nund. & Alceat. in Leg. mercis 66. *& in Leg. mercis* 207. *de verb. ſignif.*

C. ejiciens 88. *diſt.*

properly called Artificers, not Merchants: Not but Merchants may and do alter Commodities after they have bought them for the more expedite Sale of them, but that renders them not Artificers, but the ſame is part of the Myſtery of Merchants; but Perſons buying Commodities, though they alter not the Form, yet if they are ſuch as ſell the ſame at future Days of Payment for greater Price than they coſt them, they are not properly called *Merchants*, but are *Uſurers*, though they obtain ſeveral other Names, as *Warehouſe-keepers*, and the like; but Bankers, and ſuch as deal by Exchange, are properly called *Merchants*.

Paul de Caſtr. in Leg. cum ff. de Inſt.

XIV. The Wares, Merchandizes, Debts or Duties that Merchants have as joint Traders or Partners, ſhall not go to the Survivor, but ſhall go to the Executor of him that is deceaſed (*a*). And the Executor may join in an Action with the ſurviving Merchant, 2 *Levinz* 188. *Hall* againſt *Huſſam.*

31 *E.* 3. 7. *Co.* on *Littlet. fol.* 182. *per Legem mercatoriam jus accreſcendi inter Mercatores pro beneficio commercii locum non habet.*

(a) *Sed Quære*, for it hath been ſince held, that the Executor and Survivor cannot join, for the Remedy ſurvives, though the Duty doth not; and therefore on Recovery he muſt be accountable to the Executor for that. *Martin v. Crump. Salk.* 414.

1 *Vern.* 217.

In Copartnerſhips between Merchants, it is not neceſſary to provide againſt Survivorſhip.

If two joint Merchants occupy their Stock, Goods and Merchandize in common to their common Profit, one of them naming himſelf a Merchant, ſhall have an Account againſt the other, naming him a Merchant; and ſhall charge him as *Receptor* * *denariorum ipſius B. ex quacunque cauſa & contractu, ad communem utilitatem ipſorum A. & B. provenient. ſicut per Legem Mercatoriam rationabiliter monſtrare poterit*, 10 *H.* 7. 16. *a.*

* *Co. Litt.* 172. *lib. Intrat.* 17, 18, 19. *F. N. B.* 117. *D.*

Ld Raymond 340.

So where there are two joint Merchants, and one of them dies, the other ſhall have Account againſt their Factor, without the joining of the Executor of the Deceaſed.

Lex Oleron. Partners of a Ship diſagree.

If there be ſeveral Owners of a Ship, and they fall out, the Ship notwithſtanding this Variance may make one Voyage upon their Common Charge and Adventure, before ſuch time as they ſhall be ſo much as heard to diſſolve the Partnerſhip; but if after that they cannot agree, he who deſires to be free, is to offer to the reſt his Part, at a Price as he will either give or take; which if he will not do, and yet refuſes to ſett the Ship forth with the reſt of the Own-

ers

ers or Partners, then may rig the Ship at their own Charge, and upon the Adventure of the Refuſer, ſo far as his Part doth extend, without any Account to be made unto him of any Part of the Profit at her Return. But they are bound to bring her home ſafe, or to anſwer him the Value of his Part: But if the Perſons Partners, who have the greateſt Share or Part of the Ship, refuſe to continue the Partnerſhip, with one who hath but one Part, or a ſmall Share in the Ship, who cannot ſell or part with his Part at a Price ſet, without great Loſs, nor is of Ability to buy their Parts, then are they all bound to put the Ship to an Appraiſement; and ſo diſpoſe of her by Sale, or ſetting her forth on the Voyage according to ſuch Appraiſement. And if for want of Buyers, the poor Partner can neither avoid the Oppreſſion of the richer, nor yet the Rich ſatisfy the poor Man, who alſo may be obſtinate and wilful, then may the Judge of the *Admiralty* ſentence or decree the ſame, as he may do in *Omnibus aliis bonæ fidei Actionibus. Lex Mercat.* 120, 121.

In an Action upon the Caſe againſt *A.* the Plaintiff declares upon the Cuſtom between Merchants, *&c.* that if two Merchants are found in Arrear upon an Account, and they promiſe to pay it at certain Days, that any or either of them may be charged for the whole ſingly; and then ſhewed the Account, that *A.* and *B.* were found in Arrear ſo much, *&c.* and promiſed to pay it at certain Days, but did not, and the Plaintiff brought his Action againſt *A.* only, and reſolved that it lay. 2 *Rolls Abr.* 702, 703. **Action againſt one when two promiſed.**

If two Merchants have a joint Trade, and one of them accept a Bill of Exchange, if he do not pay it, an Action lies againſt the other, *per Twiſden*, Stiles 370. but rather againſt both. *Salk.* 126.

XV. And as the Law eſtabliſhes Security for their Eſtates, ſo it gives them other Immunities in their Commerce; for if one Merchant draws a Bill of Exchange upon another, be it In-Land or Out-Land, (if it be by way of Exchange) the Acceptance of the Bill by the Party ſhall bind him to that Party, to whoſe Uſe the Money in the Bill is to be paid, and he may bring his Action in his own Name, *per Legem mercatoriam.* *Martin verſus Boure.* 1 *Jac.* 2. *Cro. fol.* 7.

And ſo it is, if a third Perſon, that is a Stranger to the Bill, ſhall accept the ſame *for the Honour of the Drawer*, it *Vide tit. Exchange. Lutw.* 891. b.

it ſhall bind him as effectually, as if he, upon whom the Bill was drawn, had accepted it; and this by the Cuſtom of Merchants.

Ld *Raymond* 281. And Courts of Law will take notice of general Cuſtoms among them, without being pleaded; as that there is no Right of Survivorſhip, *&c.* but not of Special Cuſtoms.

Merchandize is ſo univerſal and extenſive, that it is in a manner impoſſible, that the Municipal Laws of any one Realm ſhould be ſufficient for the ordering of Affairs and Traffick relating to Merchants. The Law concerning Merchants is called the Law Merchant from its univerſal Concern, whereof all Nations do take ſpecial Knowledge, and the Common and Statute Laws of *England* take notice of the Law Merchant, and leave the Cauſes of Merchants in many Inſtances to their own peculiar Law. As in the 13 *Ed.* 4. 9, 10. A Merchant-Stranger made Suit before the King's Privy Council, for certain Bails of Silk feloniouſly taken from him, wherein it was moved, that this Matter ſhould be determined at Common Law; but the Lord Chancellor anſwered, that this Suit is brought by a Merchant, who is not bound to ſue according to the Law of the Land, nor to tarry the Tryal of twelve Men. And it was there likewiſe reſolved by all the Juſtices, that if the Merchandizes of ſuch a Merchant-Stranger be ſtolen and waved by a Felon, the King himſelf ſhall not have them as Waifs; otherwiſe of the Goods of a Common Perſon. *Vid.* 27 *Ed.* 3. *cap.* 20.

In War, Merchants in an Enemy's Country are privileged from any Violence to be offered them, *Grot. de jure belli & pacis*, *lib.* 2. *cap.* 11. *ſect.* 12.

There are likewiſe (for the Accommodation of Commerce and Traffick) in all Countries, privileged Ships and Boats ſerving the Country or the Prince; which have great Prerogatives of being free of Impoſts and Cuſtoms, and not ſubject to Arreſts. And all Ships are ſubject to this Service upon Command, and if they refuſe, the Ships are forfeited, by the Law *Maritime*, *Lex Mercat.* 110, 111.

If a Merchant commit any Offence, for which he is to be amerced, this Amercement ſhall be *Salva Merchandiza ſua.* For that Trade and Traffick is the Livelihood of a Merchant, and the Life of the Commonwealth, wherein the King and every Subject hath an Intereſt. *Magna Charta*, *cap.* 14. 2 *Inſt.* 28.

By

By the Statute of the 5 *H.* 4. *cap.* 7. Merchants Alien ſhall be uſed in this Realm as Denizens be in others.

To call a Merchant Alien Bankrupt is actionable. *Tarloat cont. Morriſon. Yel.* 198. 1 *Bulſt.* 134.

A Man delivered Kerſies to be ſold in *Spain*, the Factor ſells to one who becomes a Bankrupt, and it is a Law in *Spain*, that if the Factor enter it before a Regiſter, and had a Teſtimonial, that he ſhall be diſcharged. And the Court ſaid we will judge here, that he ſhall be diſcharged. 2 *Rolls Rep.* 497. *Caps* and *Tucker*.

Debt upon a Bill by a Merchant to pay Foreign Coin amounting to ſo much, to be paid upon the Feaſt of the Purification called *Candlemas-day*. Upon *non eſt factum* pleaded, *Verdict* for the Plaintiff. Moved in Arreſt of Judgment, that the Declaration was not good, becauſe Payment at *Candlemas* is not known in our Law; yet the Judgment was affirmed, for that amongſt Merchants ſuch Payment is known to be on the 20th of *February*, and the Judges ought to take notice of it, being uſed among Merchants, for the Maintenance of Traffick, *Yel.* 135. 1 *Brow.* 103. *Perniſon* and *Pountey*'s Caſe.

XVI. All other Subjects are reſtrained to depart the Realm, to live out of the Realm, and out of the King's Obedience, if the King ſo thinks fit; but Merchants are not, for they may depart, and the ſame is no Contempt, they being excepted out of the Statute of 5 *R.* 2. *cap.* 2. And by the *Common Law* they might paſs the Seas without Licence, though not to merchandize. *Dyer.* 296. 375.

XVII. It was once conceived, that thoſe Laws, which were prohibitory againſt Foreign Goods, did not bind a Merchant-Stranger; but it was ruled otherwiſe: For in the Leagues that are now eſtabliſhed between Nation and Nation, the Laws of either Kingdom are excepted; and therefore as the *Engliſh* in *France*, or in any other Nation in Amity, are ſubject to the Laws of that Country where they reſide; ſo muſt they of *France*, or any other Country be ſubject to the Laws of *England*, when Reſident here; and therefore if a *Frenchman* imports any Points, Laces, Belts, Hats, and the like, they are forfeited. 19 *H.* 7. *Tomlinſon qui tam verſ. Henry deHale. Paſch.* 36 *Eliz.* in the *Exchequer*.

XVIII. The marking of Goods is of a great Conſequence, as in relation to the ſettling the Property of the Merchandize in the right Owner; and in Courts of Juſtice, both the

Civil

Civil Law and the *Common Law* hath a great Reſpect to the ſame, therefore the Uſe has been, that every particular Merchant hath his particular Mark appropriated to him; by which means, if the Perſon is of any Value conſiderable, as in relation to Commerce, his Mark is preſently known.

The Cutlers of *London* do give to each Member a particular Mark, which cannot be uſed or appropriated, without a particular Order and Leave of the Company and Party, and ſo other Companies, 2 *Cro. fol.* 471.

Every Merchant is to ſet down his Mark upon his Book of Accompt, wherewith his Commodities are marked; ſo Companies and Societies have their particular Mark: No Merchant ought to uſe another Mark, without Leave firſt had of the Party whoſe Mark the ſame is; for as Flags are the Enſigns that give Conuſance of the Nation whoſe Ships they are, ſo Marks are to aſcertain the Owners of their Property, without Confuſion or Damage: And though to ſet the Mark of another Man alters not the Property, yet it may work ſuch a Detriment as may be very miſchievous; and therefore by the *Common Law* of *England*, if *J. S.* ſhall maliciouſly ſet the Mark of *J. D.* upon his Goods, to the Intent *J. D.* ſhall or may be brought into any Trouble, or put to any Damage or Charge, an Action of the Caſe will lie againſt *J. S.*

Ld *Raymond* 271.

The Property of Goods is in the Perſon to whom the Bill of Lading is conſigned, and he may aſſign it over. But if the Bill be ſpecial, as to deliver to *A.* to the Uſe of *B.* the Property is in *B.*

CHAP.

CHAP. VIII.

Of Factors.

I. *Factors, their Qualifications generally conſidered, in reference to their Employment.*
II. *Of Commiſſions, and the Words in the ſame, that qualify them in their Employment.*
III. *Of Commiſſions to Factors that limit their Actions.*
IV. *Of a Factor that deals for ſeveral Merchants, of the Obligations that oblige, and not oblige, each other.*
V. *Of their Power, conſidered in reference to the diſpenſing with the Debtors of their Principals.*
VI. *Where the falſe Entry, or Unfaithfulneſs of the Factor ſubjects him to anſwer Damage to his Principal; and of the like committed by the Principal, where to anſwer to the Factor.*
VII. *Of Goods remitted to Factors, and loſt in their Poſſeſſion, who bears the Misfortune.*
VIII. *Bills of Exchange drawn on the Factor by the Principal, and accepted, but before Day of Payment the Principal becomes Bankrupt, whether the ſame muſt be paid.*
IX. *Of Freighting of Ships by a Factor, where he is obliged to ſee the ſame diſcharged.*
X. *Of the general Rules to be uſed touching the Conſtruction of their Actions.*

I. A FACTOR is a Servant, created by a Merchant's Letters, and taketh a kind of Proviſion called Factorage, ſuch Perſons are bound to anſwer the Loſs, which happens by over-paſſing or exceeding their Commiſſion; but a ſimple Servant, or an Apprentice, can only incur his Maſter's Diſpleaſure. The *Spaniard* hath a Proverb, *Quien paſſa Commiſſion, pierde Proviſion: He that exceeds his Commiſſion, ſhall loſe his Factorage.* But Time and Experience hath taught them to know better things; for now it is, *Subolca la paga, His Purſe muſt pay for it.* The Gain of Factorage is certain, however the Succeſs of the Voyage proves; and it is the Prudence of Merchants to chuſe honeſt and induſtrious Perſons, for otherwiſe the Factor may grow rich, and the Merchant poor, the firſt being ſure of his Reward, the latter uncertain of his Gain.

II. In Commiſſions they now generally inſert theſe Words: *Diſpoſe, do, and deal therein, as if it were your own*; by which the Actions of the Factor are to be excuſed, though it turns to his Principal's Loſs, becauſe it ſhall be preſumed

preſumed he did it for the beſt, and according to his Diſcretion.

2 Vern. 117. *v.* 1. *Vern.* 428. & 2 *Vern.* 638.

He is barely a Truſtee for his Principal; therefore if his Principal, having Goods in his Hands, owes him Money by ſimple Contract, and then dies indebted by Specialty more than his Aſſets are worth, the Factor cannot retain the Goods.

III. But bare Commiſſion to a Factor, to ſell and diſpoſe, will not enable him to truſt, or give further Day of Payment; for in the due Execution of his Authority, he ought on a Sale to receive *quid pro quo*, and as he delivers one to receive the other; for otherwiſe by that means, as they may truſt ſix Months, they may truſt ſixteen Years: Nor by the Virtue of that Clauſe, of *doing as if it were their own*, may they truſt out to an unreaſonable Time, as ten or twenty Years inſtead of one, two or three Months, which is the cuſtomary Time for the like Commodities: And ſo it was adjudged, where one had remitted Jewels to his Factor in *Barbary*, who diſpoſed of the ſame to *Mulleſback* the Emperor, for a Sum certain to be paid at a time, which being elapſed, the Factor not obtaining it, was forced to make the ſame good to his Principal.

7 Jac. B. R. Rot. 416. *Barton & Saddocks. Bulſt.* 1. *part.* 103. *Yelv.* 202. 2. *Mod.* 100, 101.

IV. Again, one and the ſame Factor may act for ſeveral Merchants, who muſt run the joint Riſque of his Actions, though they are mere Strangers to one another; as if five Merchants ſhall remit to one Factor five diſtinct Bales of Goods, and the Factor makes one joint Sale of them to one Man, who is to pay one Moiety down, and the other at ſix Months End; if the Vendee breaks before the ſecond Payment, each Man muſt bear an equal Share of the Loſs, and be contented to accept of their Dividend of the Money advanced.

Salk. 126.

But if ſuch a Factor draws a Bill of Exchange upon all thoſe five Merchants, and one of them accepts the ſame, the others ſhall not be obliged to make good the Payment. *Tamen quære de hoc.*

Heath verſus Turner. Winch. 24, 25.

V. And as the Authority and Truſt repoſed in Factors is very great, ſo ought they to be provident in their Actions for the Benefit of their Principals; and therefore if Factors ſhall give time to a Man for Payment of Monies contracted on Sale of their Principals Goods, and after the Time is elapſed, they ſhall ſell Goods of their own to ſuch Perſons

for

for ready Caſh (leaving their Principals unreceived) and then ſuch Man break, and become inſolvent, the Factor in Equity and Honeſty ought to make good the Loſſes, for they ought not to diſpenſe with the Non-Payment of their Principals Monies, after they become due, and procure Payment of their own to another Man's Loſs; but by the Laws of *England* they cannot be compelled.

VI. Yet if Goods are remitted to a Factor, and upon Arrival he ſhall make a falſe Entry at the Cuſtom-houſe, or land them without the Cuſtomer, whereby they ſhall incur a Seizure or Forfeiture, whatſoever the Principal is endamaged, he muſt inevitably make good, nor will ſuch general Clauſe help him as above: But if a Factor makes his good Entry, according to the Envoice, or his Letter of Advice, and it falls out the ſame are miſtaken, if the Goods ſhall be loſt, yet the Factor is diſcharged.

Leviſon verſus Kirke, Trin. 7. Jac. in B. R. Lane's Rep. 65.

And as Fidelity, Diligence and Honeſty are expected from the Factor, ſo the Law requires the like from the Principal, judging the Act of one to be the Act of the other; and therefore if a Merchant ſhall remit counterfeit Jewels to his Factor, who ſells and diſpoſes them for valuable Conſiderations, as if they were right, if the Factor receives any Loſs or Prejudice thereby, by Impriſonment, or other Puniſhment, the Maſter ſhall not only make good the Damage to the Factor, but alſo render Satisfaction to the Party damnified: And ſo it was adjudged, where one *How* was poſſeſſed of three counterfeit Jewels, and having Factors in *Barbary*, and knowing one *Southern*, a Merchant, was Reſident on the Place, conſigns thoſe Jewels to his Factor, who receiving them, intreated *Southern* to ſell thoſe Jewels for him, telling him that they were good Jewels; whereupon *Southern*, not knowing they were counterfeit, ſold them to the King of *Barbary* for eight hundred Pounds (they being worth really but one hundred Pounds) and delivered the Money to the Factor, who remitted the ſame to *How*; the King of *Barbary* not long after finding himſelf cozened, committed *Southern* to Priſon till he repaid the eight hundred Pounds. Whereupon *Southern* coming for *England*, brought his Action againſt *How*, and had Judgment to recover his Damage; for the Principal ſhall anſwer for his Factor in all Caſes where he is privy to the Act or Wrong: And ſo it is in Contracts, if a Factor ſhall buy

2 *Rolls* 5. 2 *Cro.* 468. *Bridgman* 126, 127. *Popham.* 143. not reſolved in that Book. *Soame's* Caſe, *Goldſbr. fol.* 137.

buy Goods on the Account of the Principal (eſpecially if he has uſed ſo to do) the Contract of the Factor will oblige the Principal to a Performance of the Bargain.

VII. When Factors have obtained a *Provenue* or Profit for their Principal, they muſt be careful how they diſpoſe of the ſame, for without Commiſſion or Order they muſt be reſponſible. Goods remitted to Factors, ought in Honeſty to be carefully preſerved, for the Truſt is great that is repoſed; and therefore a Factor robbed, in an Account brought againſt him by his Principal, the ſame ſhall diſcharge him *. And ſo it is, if a Factor buys Goods for his Principal, which afterwards happens to be damnified, the Principal muſt bear the Misfortune: But if a Factor ſhall diſpoſe of the Goods of his Principal, and take Money that is falſe, he ſhall there make good the Loſs; yet if he receives Monies, and afterwards the ſame is by Edict or Proclamation leſſened in Value, the Merchant, and not the Factor, muſt there bear the Loſs.

* *Southcote's* Caſe, *Cok. lib.* 4. *fol.* 84.

Again, in Letters of Credit, the Factor muſt be ſure to ſee, whether the Commiſſion is for a Time certain, or to ſuch a Value, or not exceeding ſuch a Sum, or general, in which he muſt have a careful Eye.

1 *Cha. Ca.* 25. Where the Factor defrauds a State of the Cuſtoms, which is there a capital Crime in the Factor, and a Forfeiture of the Freight, he ſhall have the Benefit of the ſaving.

1 *Cha.Ca.* 30. But if the Cuſtoms were due to our King, he is bound to diſcover them on a Bill brought.

VIII. A Merchant remits Goods to his Factor, and about a Month after draws a Bill on him, the Factor having Effects in his Hands, accepts the Bill, then the Principal breaks, againſt whom a Commiſſion of Bankrupt is awarded, and the Goods in the Factor's Hands are ſeized; it has been conceived, the Factor muſt anſwer the Bill notwithſtanding, and come in a Creditor for ſo much as he was enforced by reaſon of his Acceptance to pay.

Quære, If Equity may not relieve in ſuch Caſe.

IX. If a Factor enters into a Charter-party with a Maſter for Freightment, the Contract obliges him; but if he lades aboard generally the Goods, the Principals and the Lading are made liable, and not the Factor for the Freightment.

The Principal orders his Factor, that as ſoon as he hath loaded (he having Monies in his Hand) to make an Aſſurance on the Ship and Goods, if the Ship happens to miſcarry

carry by the Cuſtom of Merchants, he ſhall anſwer the ſame, if he hath neglected his Commiſſion; ſo it is, if he having made an Aſſurance, and Loſs hath occurred, he ought not to make a Compoſition without Orders from his Principal.

X. Generally the Actions of Factors do depend on Buying, Selling, Freighting, and all other the Heads that have been treated in the ſecond Book, by which their Employment is univerſal in Matters Maritime and of Commerce; and the Queſtions which would ariſe touching the ſame, if treated on, would be *in infinitum:* However, theſe are to be the Standard *Rules* which ſhould govern their Actions, *viz.* Honeſty, Faithfulneſs, Diligence, and obſerving of Commiſſion, or Inſtructions, which being conſidered, and weighed by thoſe that ſhall be Judges of their Actions, a right underſtanding and determining of the Matters ariſing between them and their Principals, would ſoon be attained.

But thoſe ſorts of Factors that have wanted thoſe things, ſeldom or never render any other Account, but long and tedious Chancery-Suits, by which they not only have endamaged their very Trade, but ſeek to marry their Principals to a double Affliction, by obliging them to ſue either a Beggar, or that which is worſe, a naughty Man.

On the other hand, Factors that behave themſelves worthily and prudently in the Service of their Principals ought, after their tedious Service, to be numbered amongſt thoſe that juſtly challenge that worthy Denomination of *Merchant:* And ſuch was he who never made Breach of Commiſſion in the Service of his Principal, but once; that was, when Wines were committed to him to diſpoſe of, but the Price (by reaſon of a Glut) fell, Advice being given to the Principal of the ſame, who immediately in Paſſion writes to his Factor to take a Hammer and knock out the Heads; but the Factor conſidering (that Leave muſt be given to Loſers to ſpeak) knew better things, and kept the Goods, and ſold them for their full Value; and when Accompts were to be made, inſtead of bringing to the Accompt of Wines, their Heads knocked out *per Order*, worthily brought *per contra*, ſold at their intrinſick Value. Such faithful Miniſters, I ſay, juſtly deſerve that of our Saviour, *Well done*, &c. and to be no more called Factors, but Merchants.

CHAP. IX.

Of the Laws of Nature and of Nations.

I. *Of the Variety and Contrariety of human Actions, and from whence they ſpring.*
II. *Of the Difficulties that happen in the obſtructing our Inquiſition in finding that which is lawful.*
III. *Human Laws from whence they flow, and wherefore the Laws of Nature are above ours.*
IV. *No Man naturally more a Judge than another of Nature's Laws.*
V. *Nature's Laws are inſtituted for inward Goodneſs and Virtue, but State-Laws for Quiet and Repoſe.*
VI. *Of Puniſhment required by Kings againſt thoſe that violate the Laws of Nature or Nations, though the ſame touch not them, nor their Subjects, and of puniſhing an Equal.*
VII. *Of puniſhing an Equal, where that Right fails, and the Reaſons of the ſame.*
VIII. *Subjects ought not to ſeek Juſtice in the Territory of another Prince, but in their own, unleſs the Defendant become Fugitive.*
IX. *Of Kingdoms equal in Power cannot be commanded, but entreated may be, to execute the Judgment of another by the Law of Nations.*
X. *That ſuch Power of executing the Judgments or Decrees of any Foreign Nation, extends not to thoſe of Life or Honour.*
XI. *Of executing the Judgments given in a Kingdom abſolute, in another that is annexed by Conqueſt; and of the Difference of that, and one by Union.*
XII. *Where that Right fails in Plantations, and the Reaſon of the ſame.*

I. PLAIN Reaſon ſhews us, that Natural and Mathematical Cauſes have more Certitude than Civil; for Nature is always uniform and alike in its Operations. Hence Fire always burns, and never wets; a Stone in the Air naturally tends downwards, and never ſtays in the middle. In Mathematical Cauſes, ordinarily the Forms are ſuch, as have no middle interpoſed, as between even and odd there is no *medium participationis*; between a right Line and a crooked, there is no middle ſort of Line; thus two and two always make four.

II. But civil and human Actions proceeding from a mutable and various Principal (the Will*) cannot always be alike or uniform: And beſides the Will within, human Actions without, are ſubject to different Circumſtances, and to infinite Encounters; by reaſon of which their exceſſive Number, they cannot be foreſeen while Men are making Laws:

* *In quid naturale ſit ſpectandum in his quæ bene ſecundum naturam ſe habent, non in depravatis*, Ariſt. Polit. 1. 5.

Laws: Hence we may underſtand, wherefore it is ſaid, *Omnis definitio in jure eſt periculoſa*; and that *ſummum Jus* at ſome time may be found *ſumma Injuria*; as to render a Man his Sword, when he is actually mad, *&c.* And as Circumſtance hath Power to change the Matter, ſo in the Form of the Action, it leaves in the middle a Latitude, ſometimes inclining to one Extreme, ſometimes to another.

For Example, betwixt that which by Precept we are commanded ever to do, and that which we are commanded never to do, is placed that which is lawful for us now and then to do, or not to do, in Matters of our own Right, ſo far as they ſeem expedient, or not expedient for us: Thus *Joſeph* is called a juſt Man, becauſe he thought of divorceing himſelf from *Mary*, though upon Circumſtances he would not, *&c.* But that which perplexes us all here is, that this *licitum* leans ſometimes more to the one hand, ſometimes more to the other, ſometimes more to that which is abſolutely bad; from whence grow Scruples and Doubtings, whether in ſuch Twilight we really participate more of Light than of Darkneſs; that is, more of good than of bad.

Non ideo id Deum velle, quia juſtum eſt, ſed juſtum eſſe (that is due in Law) *quia Deus voluit.* Anaxarchus apud Plutarchum in Alexandro.

III. Human Laws grow moſt out of theſe middle things, *ex mediis licitis*; and upon right Examination we find, that a Man hath nothing elſe to diſpoſe, for we (poor ſubordinate Veſſels) cannot ſo much as deliberate *de abſolutè debitis*, and *abſolutè illicitis*, for they were in force before Man, Prince or People were in being, and God himſelf cannot now alter them, they flowing intrinſically, either from his Sanctity, Wiſdom and Juſtice, as he is a Creator and Governor; or elſe they flow from Nature, whoſe Rule (according to God's making it by that which is in himſelf) is right Reaſon and Honeſty. This Uprightneſs of Nature, together with that Obligation we have to be ſubject to it, was not a Moment after us, and therefore we could not determine any thing about it; for which Cauſe we have not a legiſlative Power to alter or diminiſh any of Nature's Laws.

Vaſqu' 11. *Controv.* 54. 4.

Grotius de Jure Belli ac Pacis, l. 1. *c.* 1. §. 14.

IV. St. *Paul* tells us of thoſe *who, without any After-knowledge of God's revealed Will or Laws to Man, were condemnable by thoſe of Nature alone in the puniſhing the Breakers thereof.* No Man is naturally more a Magiſtrate

than another, otherwiſe what meant *Cain*, when after his Murder he cried, *Whoſoever ſhall find me, will kill me?*

V. And though human Laws remember us of thoſe things, yet it is not as if they gave their original and primary Force of obliging; yea, Reaſon of State is not buſied ſo much about inward Piety and Virtue, as it is about publick Quiet and Repoſe, or thoſe Actions which regard another Man's receiving right or wrong: And hence it is, that great Prodigality is not ſo ſeverely puniſhed as a little Robbery; and that *malus homo poteſt eſſe bonus Civis*, the Reaſon is, becauſe though he may do himſelf Wrong in his own Rights, yet he may always do other Men right in theirs; neither is there any clear Reaſon, wherefore thoſe leſſer Sins and Impieties ſhould be puniſhed by any but God, who is wiſeſt to know them, juſteſt to weigh the Merit of them, and powerfulleſt to puniſh them.

This is the State of God's, and of Nature's Laws, to which we are all equally obliged; but our floating and circumſtantiated Laws are only to give a Rule for an equal and mutual Community in things, which God and Nature gave us to diſpoſe of as we would ourſelves.

VI. Hence it is, that Kings, and ſuch as have equal Power with Kings, have a right to require Puniſhment, not only for Injuries committed againſt themſelves or their Subjects, but for them alſo that do not peculiarly touch themſelves; as where Perſons commit Actions in Violation of the Law of Nature or of Nations, for the Liberty by Puniſhments to provide for human Society (as hath been already mentioned) was in the Hand of every Man; but after Commonwealths and Courts of Juſtice were ordained, it reſided in the Hands of the higheſt Powers, not properly as they are over others, *but as they are under none:* For Subjection to others has taken away that Right; yea, ſo much more honeſt it is to vindicate other Men's Injuries than our own, by how much more it is to be feared, that a Man in his own, by too deep a Reſentment, may either exceed a Meaſure, or at leaſt infect his Mind; however, this Right of puniſhing an Equal remains ſtill in thoſe Places where the People remain as in great Families, and not in Cities, or under ſome Government; and therefore thoſe that have now Poſſeſſions of any Parts of the New World, or *American* Iſles, till they have either voluntarily ſubmitted

Grotius de Jure Belli ac Pacis, lib. 2. cap. 21.

ted to a Government, or put them and their Diſcovery into the Hands or Protection of ſome Prince that may exerciſe Power, there remains the old and natural Right of puniſhing for Offences: So likewiſe where Perſons ſhall be aſſaulted by Pyrates on the Seas, if they be overcome, they may be immediately executed by the Law of Nature; for otherwiſe there would be a Failure of Power to puniſh ſuch: Beſides, the old natural Liberty remains in all Places where are no Judgments; ſo where they are taken and brought to a Port, and the Judge openly refuſes the Tryal of them, or that the Tryal of them cannot be had, without an apparent Detriment and Loſs to the Captors, Juſtice may be done upon them by the Law of Nature.

Vide Chap. Piracy, §. 11, 12.

Leg. extant. D. quod metus.

VII. Two Pyrates reſolving to aſſault and rob the next Veſſel they meet with, (not knowing each others Condition or Deſign) encounter, and the one happens to be overcome by the other; the Queſtion is now, whether the abovementioned Right ſo far remains, as that the ſtronger may execute him whom he hath overcome: Right Reaſon dictates, that the Evil-doer may be puniſhed, not who ſhould puniſh him; but that Nature ſufficiently ſheweth, that it is moſt convenient to be done by him that is ſuperior; yet doth it not demonſtrate this to be neceſſary, except ſuperior be taken in that Senſe, that the Evil-doer be thought to have made himſelf thereby inferior to any other, and to have it as it were degraded himſelf from the Order of Men into the Number of Beaſts ſubject to no Man, and ſuch are Pyrates, who have no other Denomination but Night-wolves, or Beaſts of Prey. By Nature it is ordained, *That the better command the worſe:* And *Ariſtotle* ſaith, *The worſe are provided for the Uſe of the better, as well in Naturals as in Artificials.* It follows hence, that at leaſt a guilty Perſon ought not to be puniſhed by another equally guilty, to which Purpoſe is that Saying of Chriſt, *Whoſoever of you is without Sin* (that is ſuch Sin) *let him throw the firſt Stone.* Pertinent is that ſaying, *The Sentence can have no Authority, where he that judgeth is to be condemned:* From whence it follows, that the right of puniſhing in ſuch caſe, at ſuch time ceaſes.

Qui non reddit faciendo quod debet, reddet patiendo quod debet, Philo. *Peccare dum feſtinatis, ad pœnas ferendas feſtinatis.*

Ariſt. 7. *Pol.* 14.

VIII. On the other hand, Subjects that have juſt Cauſe of Action, and inhabit under their own Sovereign, ought not to wave his Juſtice, and fly into the Territory of ano-

ther, but ought to ſeek it in their own, unleſs the Defendant becomes Fugitive. One *Richard Hieron* being a Merchant of *London*, and Liege-man of the King, and born in *England*, commenced a Suit againſt *J. Walden* Major of the Staple of *Calis*, and other Merchants of the Staple, and cauſed them to be arreſted in *Flanders* in the Court of the Duke of *Burgundy*, held in *Bruges*, for certain Injuries ſuppoſed by them to be made within the Juriſdiction of the King of *England* at *Calis*, and after the Defendants did appeal to the Parliament at *Paris*, and were there diſmiſſed by a Judicial Sentence, for that they had no Cognizance or Ground to inquire or examine Matters committed within the Juriſdiction of the King of *England*, and by his Subjects there inhabiting in a Foreign Court; the Record does make mention, that this was an Act ſo derogating from the Law,
Rot. Parl. 17 *E.* 3. *num.* 26. cited in Rolls Abridgment *tit.* Prerogative, *fol.* 176.
and of ſo high a Contempt, that it was enacted, Que brief de Proclamation iſſera, luy commaundant a ſurceaſar ſon dit action, & que s'il ni apres ſue les dits Defendants hors del Realm d'Angleterre per aſcun matter determinable under the Juriſdiction and Obedience of the King of *England*, qu 'on il ad juriſdiction. The Judgment given—— donque il ſerra, &c. he ſhall be put out of the Protection of the King of *England*, and forfeit all his Lands, Tenements, Goods and Chattles, and that no Pardon ſhall be to him available.

IX. Yet Kingdoms which are equal in Power, and having no Dependance on each other, cannot be commanded nor corrected of another; but if there be a Queſtion, to execute the Decree or Judgment of one in the Territory of the other, there may iſſue forth a Commiſſion of Entreaty under the Seal of that Court where the Judgment was given, or at leaſt under the Great Seal of the Prince, directed to the Judges in that Place where the Defendant is reſident, and the Judge to whom the ſaid Commiſſion is directed may award Execution, according to the Laws of Nations: And ſo it was adjudged, where one having recovered a Debt be-
1 *Ro. Ab.* 530. 1 *Lev.* 267. 1 *Sid.* 418. 1 *Ven.* 32. 2 *Keb.* 511, 610.
fore the Governor of *Frieſland*, the Defendant upon that fled for *England*, the Governor, at the Requeſt of the Plaintiff, iſſued forth his Commiſſion of Requeſt, directed *Omnibus Magiſtratibus infra Regnum Angliæ, rogans*, to make Execution of the ſaid Judgment; upon which the Judge of the Admiralty in *England* iſſued forth an Execution of that

Sentence,

ntence, and the Defendant was taken, upon which he ought his *Habeas Corpus*, and adjudged the Sentence well ecuted by the Laws of Nations, and according to the *mmon Law* of this Realm. v. Lord *Raymond*'s Rep. 935, 936.

So likewiſe, if a *Dutchman* takes up Goods at the Port *London*, and gives a Note under his Hand for the Payent of the ſame, and then flies into *Holland*, the Vendor ay apply himſelf to the *Lord-Mayor of London*; and upon roof of the Delivery, and the Sale of the Goods, the *ord-Mayor* making a Certificate of the ſame, and ſending under the City-Seal, directed, as above, they of *Holland* ill and do execute the ſame upon the Party.

Herein this laſt Caſe differs from the firſt; for by the rmer, if there ſhould fall a Queſtion about the Interpretion of the Judgment or Sentence, the ſame cannot be one, for they are not to examine the ſame; and the Reaon is, leſt the Stranger be induced at another time to do ie like, and ſo diſſolve the Judgments whereof they ſhould emand the Execution, the which would be done more rough Jealouſy of the State, than for any Injuſtice in em: Beſides, the Judgments or Sentences, which are Matters of Record, and of the greateſt Security in a Kingom, the Preſumption that they were juſtly given, ſhall lways be underſtood.

X. But in the latter, the ſame may be examined, that ;, the Merchant may be heard as to his legal Defence, ither to the leſſening or diſcharging the Debt or Damage, ut againſt the Teſtimony certified, no Objection can be nade, but the ſame is admitted, as legally proved.

But if there be a Queſtion of Honour or Life, there they nay not execute the Judgments of Foreign Judges, eſpecilly if they have not known the Merit of the Cauſes, or ſeen he Informations, or heard the Witneſſes; but more eſpeially in *England*, for there can in no reſpect whatſoever the Life of a Man (let his Offence be never ſo heinous) be rought to Puniſhment without a legal Tryal, * and that y the producing of Witneſſes *viva voce* to his Face; yet Princes for the Reſpect they bear each other, and for the good of Juſtice, though they cannot at the bare Requeſt of the Judges of another Prince, put them to Death; yet they may for exemplary Puniſhments (which ought to be made upon the Places where the Fact was committed) yield the

* *Cok.* 4. *Inſtit. fol.* 38.

Soto de Juſt. & Jure, l. 5. qu. 1. Art. 7. Satius judicamus eſſe paucos aliquos mala ferre, quam immenſam multitudinem, Zonaras, natural Subject to his natural Prince, unleſs the Prince, to whom the Fugitive is fled, finds that he is unjuſtly purſued; for in ſuch Caſes he is not bound to yield them; yea, he is forbidden by the Law of God to reſtore a Bond-man, which is fled into another Man's Houſe to avoid the Fury of his Maſter.

* *Paſch. 24. Car. 2. in B. R. in Hibern. inter Warde* and *Mogr.*

XI. And as the ſame is in Caſes Foreign, ſo likewiſe in thoſe Eſtates that are under the *Crown of England*; and therefore if a Man recovers againſt * *J. S.* in the *King's-Bench* in *England*, and then the Defendant flies over into *Ireland*, the Judgment may be certified over into the *Chancery* in *Ireland*, and they may by *Mittimus* ſend it into the *King's-Bench* there, and they may award Execution, or otherwiſe the Party may bring his Action of Debt on the ſame; ſo the like has been done for Decrees given in the *Chancery* in *England*, which have been exemplified under the Great Seal, directed to the King's Lieutenant, for the putting the ſame in Execution there; but in no Caſe a Judgment given in *England* may be certified over under any other Seal but that of the Great one.

Vide the Act of Parliament for the Union of *England* and *Scotland*.

But in *Scotland* it is otherwiſe, for that is a Kingdom abſolute, and not like *Ireland*, which is a *Crown* annexed by *Conqueſt*, but the other is by Union; and though they be united under one Prince *ad fidem*, yet their Laws are diſtinct, ſo as if they had never been united; and therefore the Execution of the Judgments in each other, muſt be done upon Requeſt, as above, and that according to the Laws of Nations.

* *See Contra* 2. *P. W.* 75. *Engliſhmen* carry their Laws with them.

XII. But *Colonies* or *Plantations*, which are reduced into the Condition of great Families, have not this Right of Requeſting, for they are governed by the Laws * preſcribed by the Sovereign of the ſame, who may ſet Juriſdictions, and make them Places privileged, not to have the Perſons attached or arreſted in any other Places, but within their own Bounds, ſo likewiſe upon their firſt forming or Inſtitution, may ſo declare, that for any Debt or Contract made or done in any Place but in that of the ſame *Plantation*, they ſhall not be impleaded; and therefore in *Virginia* at this Day, if a Man contracts a Debt in *England*, and flies to the ſame, he cannot be there impleaded: But if a Man takes up Goods, and carries the ſame over thither, there he may be ſued in the Place; ſo likewiſe if it can be proved he carried over the

the Money borrowed, and this amongſt others of the Laws and Conſtitutions of thoſe *Plantations*, is preſerved inviolably, the ſame being as it were a Pledge and general Safety, which is given to thoſe Inhabitants that ſhall reſort thither, and there plant themſelves for the Good of the Place; and although thoſe that thither fly, by reaſon of great and unreparable Loſſes, have contracted Debts far beyond their Ability to ſatisfy, a Failure of which, in Strictneſs of Law, may (if the Creditor pleaſes) oblige their Bodies to Impriſonment; yet doth it not thence follow, that the ſame ought to be exacted; for though the Body of Man may gratify the Revenge of the Creditor, yet it never can pay the Debt; wherefore if thoſe Ends by themſelves in a moral Eſtimation be not neceſſary, or if other Ends on the oppoſite Part occur, not leſs profitable or neceſſary, or if the Ends propoſed by Impriſonment may be attained any other way, it will then follow, that if there be nothing of Obligation on the Debtor's Part, to render himſelf a Priſoner to the Creditor, that then if the ſame can or may be avoided by flight, the ſame in Conſcience may be done; according to that of *Cicero, It was not fit perhaps to diſmiſs him being brought to Judgment, but that he ſhould be inquired after, and brought to Judgment, was not neceſſary.*

Ad Quintum Tract. 1. 21.

FINIS.

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